

## UNDERSTANDING AFRICAN AND LIKE-MINDED COUNTRIES' POSITIONS AT WIPO-IGC

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### ABSTRACT

*Since 2001, World Intellectual Property Organization (WIPO) member states and regional blocs have been striving to agree on an international legal instrument(s) covering the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs), and genetic resources (GRs).<sup>1</sup> They have been conducting this task pursuant to the mandate of an expert committee of WIPO—the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (now known as traditional cultural expressions) (IGC). For nearly two decades of the committee’s work, progress has come rather slowly, leaving a lethargic haze not only over the African Group as a bloc, but also over the category of countries*

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<sup>1</sup> Although the IGC was set up in 2000, the actual textual negotiations started in 2009.

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*and regional groups broadly known as demandeur states. Demandeur states are heavily invested in demanding stronger protection of the subject matter covered by the IGC mandate. While the IGC’s work has provided policy and jurisprudential insights into the subject matter of its mandate, its prospects of ultimately delivering on its mandate remain unknown. Using the structure of the emerging tripartite instruments under negotiation, this Article seeks to shed light on the position of like-minded states with a bias for African Group activism on key negotiating interests and the overall dynamic in which those positions are advanced.<sup>2</sup> This Article provides some international legal context for the IGC’s work and concludes by offering insights on African and like-minded countries’ strategy moving forward—whether within or outside of the IGC.*

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<sup>2</sup> Each member state participates in these negotiations as a sovereign entity. They retain their rights to advance national positions which may diverge from regional ones. However, in the IGC, the African Group effectively participates as a strong regional voice. It has fairly and effectively managed to coordinate the views of member states and to project a harmonized position on substantive matters for the most part.

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## **I. PART I: INTRODUCTION**

Historically, knowledge governance is an entrenched part of the colonial project.<sup>3</sup> Due to the theory of international division of labor, colonial outposts of the global south were the sources of raw materials for empire building.<sup>4</sup> These materials included, in addition to human beings, a vast range of natural resources—wealth found in the biologically diverse regions of the global south,

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<sup>3</sup> See generally EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1994); see also ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES (Boaventura de Sousa Santos ed., 2007).

<sup>4</sup> PHILIP MCMICHAEL, *DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE 3* (SAGE Publ'ns, 6th ed. 2016). See generally Ulrich Hiemenz, *The Concept of the International Division of Labour and Principles of Cooperation*, in *THE NEWLY INDUSTRIALIZING ECONOMIES OF ASIA: PROSPECTS OF CO-OPERATION* 211 (Manfred Kulessa ed., 1990) (explaining the theory of international division of labor).

including Africa.<sup>5</sup> For the most part, under the colonial project, the contributions of the peoples and civilizations of the global south were characterized merely as resources.<sup>6</sup> The knowledge systems, cultural practices, and worldviews that undergirded the uses of those resources in their local and anthropological settings were not considered to be of value or “scientific” in nature.<sup>7</sup> Indigenous Peoples and Local Communities (IPLCs), as they are now designated, were “incapable” of intellectual or scientific enterprise in their dealings with natural resources.<sup>8</sup> As with other naturally-bestowed resources, they were seen as existing in a perpetual state of raw nature.<sup>9</sup> For all practical purposes, in the colonialist’s eyes, they were regarded as raw materials and the objects of unbridled experimentations and exploitations.<sup>10</sup> For the colonialists, IPLCs’ dealings with these resources had no recognizable human ingenuity or originality under their framework for knowledge governance.<sup>11</sup>

As if the non-recognition of the IPLCs’ knowledge and intellectual contribution to their direct use of natural resources was not enough, their rich expressive repertoire of creative endeavors (i.e. folklore) also went unrecognized

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<sup>5</sup> See Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTEL. PROP. 29, 33 (2008) [hereinafter *Local Knowledge*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Chidi Oguamanam, *Pressuring ‘Suspect Orthodoxy’: Traditional Knowledge and the Patent System*, in INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 313, 315 (Matthew Rimmer ed., 2015) [hereinafter *Suspect Orthodoxy*].

<sup>9</sup> *Id.*

<sup>10</sup> See *Local Knowledge*, *supra* note 5, at 33.

<sup>11</sup> *Local Knowledge*, *supra* note 5, at 33. See generally BOAVENTURA DE SOUSA SANTOS, *THE END OF THE COGNITIVE EMPIRE: THE COMING OF THE EPISTEMOLOGIES OF THE SOUTH* (2018).

as credible sources of knowledge production. Folklore, now referred to as TCEs, captures complex applications of language with a vast range of expressive ingenuity in cultural and social settings, narratives, and renditions, such as music, dancing, choreography, compositions, poetry, incantations, recitations, etc. Predictably, in the colonial view, other sites of knowledge production were considered highly irrational—especially in view of their spiritual essences and worldviews, as well as in their multifaceted and overlapping contexts, including dreaming, revelation, inspirations, ceremonies, rituals and aspects of sacredness or sacralisation.

The colonial knowledge governance standard is entrenched in the intellectual property rights system.<sup>12</sup> It is a model designed more for allocating rights over knowledge, than for allocating responsibilities over knowledge. It is a rights-based regime that arbitrarily sets a framework for determining the recognizable and rewardable range of creativity and innovation. That framework has delineated, using highly restrictive parameters, the sites for knowledge production by employing the following categories: patents, copyrights, trademarks, plant breeders' rights, and a range of emerging rights which are negotiated under strict market economic restrictions. Intellectual property rights are rooted in their European origins.<sup>13</sup> As concepts and legal principles, they were transplanted by Europe into the diverse colonial

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<sup>12</sup> See *Local Knowledge*, *supra* note 5, at 33; see also *Suspect Orthodoxy*, *supra* note 8, at 315.

<sup>13</sup> See Michael Birnhack, *Colonial Intellectual Property*, in HANDBOOK ON INTELLECTUAL PROPERTY RESEARCH (Irene Calboli & Maria Montagnani eds., forthcoming 2019) (manuscript at 2), <https://ssrn.com/abstract=3160947> [<https://perma.cc/SNA2-V64R>]; Ikechi Mgbеoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization*, 5 J. HIST. INT'L L. 403, 406 (2003).

outposts of the global south, including Africa.<sup>14</sup> During the gradual process of globalizing the European intellectual property system, Europe represented Africa and most of the developing world at the table.<sup>15</sup> Through the European colonial capture of the continent and the consequential extension of European legal traditions, Europe foisted on Africa a Eurocentric vision of knowledge governance. As with all colonial projects, the legitimacy of that vision was premised on denying or discrediting African innovation and creativity with its robust knowledge production practices.<sup>16</sup> There was no authentic African input that could have advocated for a pluri-cultural system of knowledge governance, one that would have accounted for the traditional knowledge and practices of the non-European civilizations of Africa.<sup>17</sup>

In the post-independence era, specifically after the 1970s, Africa, and other colonized parts of the world, have continued to make the case for the recognition of their contribution to knowledge, not only as mere sources of raw materials, but more importantly for their traditional knowledge, innovations, and practices associated with the

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<sup>14</sup> For a critical historical narrative of the complex colonial undertone of IP, see generally Lionel Bently, *The 'Extraordinary Multiplicity' of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, 12 THEORETICAL INQUIRIES L. 161 (2011).

<sup>15</sup> For a degree of these sentiments, see generally Ndene Ndaye, *The Berne Convention and Developing Countries*, 11 Colum. J.L. & Arts 292 (2002); Irwin A. Olian Jr, *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7:2 CORNELL INTELL. L.J. 81 (1974); Daniel J. Gervais, *Internationalizing Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 292 (2002).

<sup>16</sup> Olufemi Taiwo, *Colonialism and Its Aftermath: The Crisis of Knowledge Production*, 16 CALLALOO 891, 898 (1993).

<sup>17</sup> See, e.g., *id.* (discussing several influences, including colonial influences and their role in the decimation of the “mode of knowledge production” in Africa, especially in the Nigerian context).

use of those natural resources.<sup>18</sup> However, the push for international recognition of traditional knowledge was not matched internally at the national and regional levels in Africa. Ironically, in many African countries, domestic laws relating to intellectual property have continued the legacy of the colonial statutes.<sup>19</sup> It is only recently that there have been national and regional efforts, albeit still inchoate, at taking traditional knowledge seriously as the basis for a regional treaty or national legislative activities.<sup>20</sup> Nonetheless, the intersection of intellectual property and traditional knowledge is a subject of tense international debate.

Meanwhile, traditional knowledge has assumed an unprecedented prominence in international discourse where

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<sup>18</sup> In the context of developing countries in general, these tensions are articulated in Rafik Bawa, *The North-South Debate over the Protection of Intellectual Property*, 6 *DALHOUSIE J. LEGAL STUD.* 77 (1997); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will Developing Countries Lead or Follow?*, 46 *HOUS. L. REV.* 1115 (2009).

<sup>19</sup> Save for more progressive and responsive legislation on copyright, most domestic laws in African countries on other regimes of intellectual property, notably patents, largely reflect the status quo under the colonial era. Ironically, only recently via international developments around patent and design laws and on traditional knowledge have individual countries shown interest with regard to domestic reforms of intellectual property laws.

<sup>20</sup> More than other countries, Kenya and South Africa have had proactive legislative activity relevant to intellectual property with special mention here of indigenous/traditional knowledge. At the regional level, aside from the institutional model of intellectual property administration represented in the OAPI and ARIPO, two instruments—(1) the 2000 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources; and (2) the 2010 Swakopmund (Namibia) Protocol on the Protection of Traditional Knowledge and Expressions of Folklore—symbolically depict the increasing African regional consciousness over Traditional Knowledge.

its interface with the escalation of intellectual property rights is most visible.<sup>21</sup> These interfaces include the topics of innovation and knowledge production through the use of genetic resources for food, agriculture, farming, medicine, pharmaceuticals, environmental management, and biodiversity conservation, with spillover effects on sub-industrial categories such as cosmetics, natural health and food products, horticulture plant breeding, etc.<sup>22</sup> These are also sites for new, complex knowledge frontiers in biotechnology, which implicates the use of digital applications for the generation, sequencing, as well as overall application of vital genetic information. Without question, intellectual property and traditional knowledge have, at the same time, ceased to be arcane subjects. Instead, they are now subjects of, and driven by, interdisciplinary and complex regime convergences with associated tensions arising over competing interests.<sup>23</sup>

Recognizing that there are numerous international fora where the interface of traditional knowledge and intellectual property continues to be negotiated, this Article focuses on the World Intellectual Property Organization's (WIPO) IGC. The IGC was established in 2000, courtesy of the WIPO General Assembly, as a forum for member

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<sup>21</sup> Susette Biber-Klemm, *Biotechnology and Traditional Knowledge: In Search of Equity*, 2 INT'L J. BIOTECHNOLOGY 85 (2000); BIODIVERSITY AND THE LAW: INTELLECTUAL PROPERTY, BIOTECHNOLOGY AND TRADITIONAL KNOWLEDGE (Charles McManis ed., 2007).

<sup>22</sup> See generally DANIEL F. ROBINSON, CONFRONTING BIOPIRACY: CHALLENGES, CASES AND INTERNATIONAL DEBATES (2010) [hereinafter CONFRONTING BIOPIRACY] (providing a sense of the degree in which traditional knowledge has proven relevant across a range of industries, including agriculture, genetic resources, seed production, biotechnology, etc.).

<sup>23</sup> Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 14, 33 (2007).

states to explore intellectual property issues implicated in the access to genetic resources and the benefit sharing arising from their intersection with the protection of traditional knowledge and TCEs. Following years of foundational work, the mandate of the IGC has evolved. It now includes the negotiation of text-based international legal instrument(s) for the effective protection of genetic resources, traditional knowledge and traditional cultural expressions.<sup>24</sup> For the nearly two decades of the IGC's existence, progress for demandeur states has stagnated.<sup>25</sup> The term “demandeur states” refers to states and IPLCs that are heavily invested in the push for stronger protection of the subject matters covered under the IGC mandate.

While the IGC's work has resulted in a variety of policy and jurisprudential insights into the subject matters of its mandate, its prospects of ultimately delivering on its mandate remain unknown. Using the structure of the tripartite instruments under negotiation, this Article seeks to shed light on the African Group's position, as well as the position of demandeur states under the aegis of Like-Minded Countries (LMCs), within the overall dynamic of the IGC negotiations. It does so first by situating the IGC in its international legal context. It then explores eight

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<sup>24</sup> World Intellectual Property Organization [WIPO], *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, at ¶ (a), (Oct. 2-11, 2017), [https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_2018-2019.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf) [<https://perma.cc/SVR2-PWJ8>].

<sup>25</sup> See Chidi Oguamanam, *Ramifications of WIPO IGC for IP and Development*, in *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE*, 339 (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffé eds., 2017) [hereinafter *Ramifications of WIPO IGC*]. The volume contains diverse perspectives and reflections of many actors directly or indirectly involved in the work of the IGC.

substantive issues and their dynamics at the IGC negotiations. The Article concludes by offering cursory insights on African and LMCs’ strategy going forward—whether within or outside of the IGC.

## II. PART II

### A. *The WIPO-IGC in Context*

The IGC is a creature of circumstance. The context for its birth, as discussed above, reflects a combination of many factors. Historically, the IGC best symbolizes the need to integrate the knowledge and cultural production of non-Western peoples into the intellectual property system—or, perhaps more appropriately, its *sui generis* renditions—despite lingering concern over the fitness of intellectual property rights regimes for traditional or indigenous knowledge.<sup>26</sup> As far back as the 1960s, the use of new technologies to appropriate folkloric works, long recognized as integral aspects of the cultural identity of IPLCs, was an increasing source of worry.<sup>27</sup> The Berne Convention for the Protection of Literary and Artistic

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<sup>26</sup> PETER DRAHOS, INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE AND THEIR KNOWLEDGE 2 (2014); Susy R. Frankel, *Branding Indigenous Peoples’ Traditional Knowledge*, in *The Law of Reputation and Brands in the Asia Pacific*, in THE LAW OF REPUTATION AND BRANDS IN THE ASIA PACIFIC 253 (Andrew T. Kenyon, Ng-Loy Wee Loon & Megan Richardson eds., 2012); Ikechi Mgeboji, *Patents and Traditional Knowledge of the Uses of Plants: Is Communal Patent Regime Part of the Solution to the Scourge of Biopiracy?*, 9 IND. J. GLOBAL LEGAL STUD. 163, 163–64, 169–71 (2001).

<sup>27</sup> See World Intellectual Property Organization [WIPO] & United Nations Educational, Scientific and Cultural Organization [UNESCO], *Commentary to the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, at ¶ 2 (1985), <https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf> [<https://perma.cc/4WL5-H6X9>] [hereinafter *Commentary*].

Works, which could have been a perfect regime for the protection of folklore, was revised in 1967.<sup>28</sup> Yet, that revision premised protection of such works on originality and on clearly identifiable authorship, a test that most TCEs could not meet.<sup>29</sup> The combined efforts of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) resulted in the 1985 recommended Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions.<sup>30</sup> The Model Provision, as it came to be known, was unmistakable in its *raison d'être*:

The accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography may lead to improper exploitation of the cultural heritage of the nation. Expressions of folklore are being commercialized by such means on a world-wide scale without due respect for the cultural or economic interests of the communities in which they originate and without conceding any share in the returns from such exploitations of folklore to the peoples who are the authors of their

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<sup>28</sup> Berne Convention for the Protection of Literary and Artistic Works art. 15, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986), [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P192\\_37445](https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P192_37445) [<https://perma.cc/28CL-RRMC>].

<sup>29</sup> See *Commentary*, *supra* note 27.

<sup>30</sup> World Intellectual Property Organization [WIPO] & United Nations Educational, Scientific and Cultural Organization [UNESCO], *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1985), <https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf> [<https://perma.cc/R8GF-95CF>] [hereinafter *Model Provisions*].

folklore. In connection with their commercialization, expressions of folklore are often distorted in order to correspond to what is believed to be better for marketing them.<sup>31</sup>

The Model Provisions were a form of international endorsement of the developments that had occurred at the national level over the urgent need to stem the tide of the exploitation and distortion of TCEs. It acknowledged that folklore is a manifestation of the cultural identity of peoples and countries, especially those in the developing world, and “a most important means of self-expression . . . and a living, functional tradition rather than a mere souvenir of the past.”<sup>32</sup> It was part of a renewed drive to fix the gap in intellectual property law in the creative and expressive realms, further evinced by the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), both of 1996.<sup>33</sup> The WPPT provides for rights over performative expressions (performer’s rights) associated with folklore. The WPPT is, in part, a response to the use of digital technology to appropriate the rights of performers.<sup>34</sup> The WCT derives

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<sup>31</sup> *Id.* ¶ 2.

<sup>32</sup> *Id.* ¶ 1.

<sup>33</sup> World Intellectual Property Organization Copyright Treaty (WCT), Dec. 20, 1996, 2186 U.N.T.S. 121; World Intellectual Property Organization Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, 2186 U.N.T.S. 203.

<sup>34</sup> See World Intellectual Property Organization [WIPO], *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, [https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages\\_wct\\_wppt.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf) [<https://perma.cc/66QE-D8MP>] [hereinafter *Adherence to WCT and WPPT*]. See generally Ruth Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 *FORDHAM L. REV.* 2379, 2379–80 (2009).

its existence from the Berne Convention. It focuses on the additional economic rights that attach to the works of authors in the digital milieu, with a special interest in computer programs and the compilation of data or databases.<sup>35</sup> The Model Law, the WPPT, and the WCT are part of the wide range of international responses happening in different fora, notably UNESCO and, of course, WIPO. To some degree, they all expose and attempt to plug the gaps in global knowledge governance with regard to the unaccounted cultural milieu for the production of knowledge, including those outside of the conventional Eurocentric model.

Perhaps the next most important context leading to the IGC relates to the convergence of multiple factors that have brought biological diversity (biodiversity), genetic resources, and their conservation to the center of knowledge governance in the life sciences industries.<sup>36</sup> Global biodiversity depletion is considered to be one of the early warning signs of the current environmental crisis. Notably, from the 1987 Brundtland Commission Report, through to the 1992 Rio sets of international environmental instruments, clear recognition has been given to the environmental and conservation ethics of IPLCs.<sup>37</sup> At the foundation of environmental ethics and stewardship of nature are the traditional knowledge systems of IPLCs.<sup>38</sup>

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<sup>35</sup> See *id.*; see also Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 54 CASE W. RES. L. REV. 4751, 753, 758 (2007).

<sup>36</sup> GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: PAST, PRESENT AND FUTURE* (World Scientific 2d ed. 2009).

<sup>37</sup> Charity Emelie, *United Nations Conference on the Environment After Rio: It Implications for Environmental Protection* (2019), <https://ssrn.com/abstract=3394167> [<https://perma.cc/79VE-YC9V>].

<sup>38</sup> See generally CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE* (University of Toronto, 2010).

The systems are rooted in IPLCs’ worldviews and premised on complex relationships with the ecosystem that must be negotiated with a view towards balance and sustainability.<sup>39</sup> The 1992 Rio Conference on Environment & Development yielded many sets of international environmental instruments, with their underlying philosophy depicted in Agenda 21 (Global Plan of Action for Sustainable Development).<sup>40</sup> Along with subsequent instruments, they now constitute crucial components of modern international environmental law. In their preambular proclamations and substantive provisions, these instruments contain concrete affirmations of TK and its proactive incorporation as a policy strategy for environmental conservation and sustainable development. That approach is consolidated in the UN Convention on Biological Diversity (CBD) and associated instruments such as the International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (NP). These three instruments embody a regime for incentivizing providers of genetic resources and holders or custodians of associated TK through a framework that ties access to those resources and knowledge to a negotiated benefit-sharing scheme.<sup>41</sup> The

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<sup>39</sup> *Id.*

<sup>40</sup> On the Rio pack of international agreements and pivotal status of Agenda 21, see Chidi Oguamanam, *Protection of Indigenous Knowledge in International Law: Solidarity Beyond the Nation-State*, 8 LAW TEXT CULTURE 191 (2004). See generally UN Conference on Environment and Development, *Agenda 21: Rio Declaration on Environment and Development*, para. 1.1, U.N. Doc. A/CONF.151/26/Rev.1/Vol.1 (June 3, 1992), at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Rev.1\\_Vol.%201\\_Agenda.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Rev.1_Vol.%201_Agenda.pdf) [<https://perma.cc/8V5E-HD4S>].

<sup>41</sup> For the foundational justification and operational experience of ABS, see generally CONFRONTING BIOPIRACY, *supra* note 22; DANIEL F.

idea is to ensure that TK holders and custodians, who are invariably providers of genetic resources, benefit adequately from the knowledge transformation associated with the uses of genetic resources and their knowledge by external actors. Despite its bias for market economic commodification of both genetic resources and TK, such a practical and theoretical sense of integration comes with recognition of the value of TK and support for the traditional conservation practices associated with its production.

At the same time TK was being entrenched into international environmental law, it was emerging and being consolidated as an integral component of international human rights law.<sup>42</sup> Without question, the value of TK and the need for its protection is captured as part of the foundational international human rights instruments, as well as other emergent instruments to some degree.<sup>43</sup> Most notably, TK is strongly reflected in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the works of UN Permanent Forum on Indigenous Issues, and the Expert Mechanism on the Rights of Indigenous Peoples pursuant to the Economic and Social Council (ECOSOC) of the UN. The latter is one of the platforms that drives the implementation of UN sustainable development as socio-economic and environmental matters.

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ROBINSON, BIODIVERSITY, ACCESS AND BENEFIT SHARING: GLOBAL CASE STUDIES (2015).

<sup>42</sup> For early scholarly insights and framing of the intersection of traditional knowledge and human rights, see Hans Morten Haugen, *Traditional Knowledge and Human Rights* 8 J. WORLD INTELL. PROP. 663 (2005).

<sup>43</sup> See articles under the right to culture and cultural participation in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights.

Add to the foregoing, a combination of biotechnology-induced opportunism, which supervised rampant exploitation of genetic resources, associated TK through the patenting process, intensified the historical pattern of global inequity in the exploitation of genetic resources and associated TK to a new dimension.<sup>44</sup> The practice was designated first by activists and civil society as “biopiracy.” Coined by Canadian civil society icon, Pat Mooney, biopiracy sums developing countries’ distaste and resistance to the exploitation of their own resources and knowledge via western intellectual property systems.<sup>45</sup> As a process and practice, it monopolizes a range of pre-existing traditional bio-cultural knowledge of the uses of plant genetic resources. It portrays the practical consequences of the gaps in intellectual property regarding TK. In Africa, the uses or applications of the following genetic resources and/or associated TK that straddle pharmaceutical, medicinal, and agriculture experiences are among the globally reported cites of biopiracy: Hoodia, Rooibos Tea (Southern Africa), Rosy Periwinkle (Madagascar) Endod Berry (Ethiopia), Cowpea (Nigeria), Argan Oil (Morocco), etc.<sup>46</sup>

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<sup>44</sup> IKECHI MGBEOJI, *GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE* (UBC Press 2006); VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (N. Atl. Books 2016).

<sup>45</sup> Co-founder of the Rural Advancement Foundation International (RAFI) which later became the ETC Group.

<sup>46</sup> JAY MCGOWN, *OUT OF AFRICA: MYSTERIES OF ACCESS AND BENEFIT SHARING* 8, 16 (Edmonds Institute 2006); *CONFRONTING BIOPIRACY*, *supra* note 22, at 14, 72; *see also* Margo A. Bagely, *Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa*, (CIGI Papers No. 207) (Dec. 7, 2018), available at <https://www.cigionline.org/publications/toward-effective-indigenous-knowledge-protection-regime-case-study-south-africa> [<https://perma.cc/8493-Q85K>]; Doris Schroeder et al, *The Rooibos Benefit Sharing Agreement – Breaking New Ground with Respect, Honesty, Fairness and Care*, 29 *CAMBRIDGE Q. HEALTHCARE ETHICS* 285 (2020).

Even though in its broad understanding, biopiracy has been ongoing since the colonial times, it became most pronounced at the onset of what analysts describe as biodiscovery or bio-revolution.<sup>47</sup> Bio-revolution depicts unprecedented research and development (R&D) in the life sciences industry using biological resources and the applications of digitally-enhanced derivative information across a wide range of fields and to an unparalleled scale.<sup>48</sup> Prior to now, intellectual property was restrained regarding its application to life-sciences-related innovation. However, following judicial and legislative reconceptualization of IP in the United States on two fronts, the U.S. supervised the escalation of IP over genetic resources, a development that later created global tension between IP and TK.<sup>49</sup> Specifically, patents were extended to life forms including genetically engineered microbes and other biotechnology products that did not previously exist in nature. Another reason for the escalation of IP was the United States-led charge to invert IP's role as a legally sanctioned monopoly and exception to free trade rules. The U.S. successfully adopted a radical counter-narrative of IP, one that repositioned IP as a catalyst for free trade as symbolized in the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). That agreement, in a way, has been a significant site for power play and source of new international norms for intellectual property.<sup>50</sup>

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<sup>47</sup> Daniel F. Robinson, *BIODIVERSITY ACCESS AND BENEFIT SHARING: GLOBAL CASE STUDIES 4* (2015).

<sup>48</sup> See generally DANIEL J. GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (Sweet & Maxwell 2008); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (Cambridge Univ. Press 2003).

<sup>49</sup> See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

<sup>50</sup> See Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109 (2006).

In this new narrative, along with OECD countries, the U.S. took charge in birthing the TRIPS Agreement as the most powerful international standard setting instrument for IP.<sup>51</sup> TRIPS is an annex to the then-emergent global free trade regime under the auspices of the WTO, the successor to the GATT.<sup>52</sup> In Article 27, TRIPS provides for a strong and inclusive protection of intellectual property to virtually all subject matters at the national level as a crucial requirement for a country to participate in the global free trade space. Not surprisingly, despite its expansive orientation, TRIPS reflects the pattern and legacy of colonially-oriented or, some would argue, neo-colonial global knowledge governance.<sup>53</sup> As the most authoritative multilateral instrument on IP, TRIPS omitted any direct mention or recognition of TK. Yet, TRIPS created an enabling legal framework that promoted the continuing appropriation of GRs, associated traditional knowledge (aTK), and, of course, TCEs.<sup>54</sup>

Ironically, therefore, the seed of the intensified agitation for the protection of GRs, TK, and TCEs was sown by the TRIPS Agreement which some insightful analyses perceive as a blessing in disguise of sorts.<sup>55</sup> Reports of recurring instances of biopiracy demonstrated the practical interconnectedness of TK, GRs, and even

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<sup>51</sup> CONFRONTING BIOPIRACY, *supra* note 22, at 40.

<sup>52</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>53</sup> Andreas Rahmatian, *Neo-Colonial Aspects of Global Intellectual Property Protection*, 12 J. World Intell. Prop. 40 (2010).

<sup>54</sup> This is possible due to a lack of accommodation for traditional knowledge in TRIPS and the expansive elaboration of intellectual property subject matter protection under that instrument.

<sup>55</sup> See Anthony Taubman, Thematic Review: *Negotiating “Trade-Related Aspects” of Intellectual Property Rights*, in THE MAKING OF TRIPS AGREEMENT: PERSONAL INSIGHTS FROM URUGUAY ROUND NEGOTIATIONS (Jayashree Watal & Anthony Taubman eds., 2005).

TCEs in ways that implicate the role of IP in their exploitation through unidirectional knowledge transfer and marginalization of vulnerable populations. Sparked by the negative impact that TRIPS had on access to medicines, African countries and their developing country partners pushed for the 2001 Doha Declaration on TRIPS and Public Health.<sup>56</sup> A Declaration that later resulted in the amendment of TRIPS' Article 31, accommodating unequivocally an interpretive flexibility and application of TRIPS with sufficient leverage to side-step patent-imposed constraints in order to advance access to essential medicines for vulnerable populations in developing countries.<sup>57</sup> The interpretive approach seen in the amendment of Article 31 is consistent with Articles 7 and 8 of the TRIPS Agreement.<sup>58</sup>

Parallel pressure by developing countries to address the issue of lingering inequity in the global knowledge governance process was deflected from the WTO to the WIPO-IGC. There was an unspoken but generally known perception by actors of developed countries that agitation at the WTO could stall progress on free trade under that instrument. Consequently, a new venue for a *talk show*, as it were, on TK was to be created. WIPO has since identified the protection of TK as one of the global intellectual property issues of the century. That was pursuant to the 1999 WIPO-commissioned Fact-finding Missions on TK, Innovations, and Practices of Indigenous

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<sup>56</sup> World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/W/241 ILM 746 (2002).

<sup>57</sup> See Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L. 497–98 (2002); Stine Jessen Haakonsson & Lisa Ann Richey, *TRIPS and Public Health: The Doha Declaration and Africa*, 25 DEV. POL'Y REV. 74–75 (2007).

<sup>58</sup> Articles 7 and 8 are titled “objectives” and “principles” respectively.

and Local Communities.<sup>59</sup> WIPO was well-positioned to continue the quest through the IGC. However, for countries that have historically shown much disregard for TK and its custodians, the WIPO-IGC as a forum could not be taken seriously. It could definitely have been a red herring. However, in 2009, after nearly a decade of exploratory work, the WIPO-IGC made a significant leap and embarked on text-based negotiations pursuant to the mandate from the WIPO General Assembly.<sup>60</sup> Even though the IGC has yet to deliver on its mandate, it has created a rich repertoire of insights and has developed new and emerging jurisprudence around GRs, TK and TCEs that have served as complementary assets for different contexts where these issues are engaged.<sup>61</sup> The next section explores the tripartite IGC negotiating framework as a work in progress.

### ***B. WIPO-IGC: The Tripartite Framework Amidst Conceptual Schism***

One of the earliest problems in dealing with the three core subject matters in the IGC’s mandate (Genetic Resources, Traditional Knowledge, and Traditional Cultural Expression) is the conceptual question over the propriety of tackling those subject matters as separate and separable subjects on one hand, or as inseparable pieces of a whole on the other. A related conceptual question arises regarding the nature of the instrument(s) negotiated under

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<sup>59</sup> World Intellectual Property Organization [WIPO], *Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, at 251 (April, 2001), [https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo\\_pub\\_768.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf) [<https://perma.cc/4Z46-GLY9>].

<sup>60</sup> The progress of WIPO-IGC are captured in *Ramifications of WIPO IGC*, *supra* note 25.

<sup>61</sup> *Ramifications of WIPO IGC*, *supra* note 25, at 339–46.

the IGC in relation to intellectual property. The question ponders the extent the instrument(s) can mirror conventional intellectual property rights. These conceptual questions correspondingly constitute sources of the ideological divide between developed and developing countries in the dynamics of the IGC negotiations.

Approached from many Indigenous or Non-Western worldviews, reducing nature's endowed web of natural resources and vast range of human knowledge/experiences associated with their uses into compartments is less than an appropriate approach. Even in Western Cartesian compartmentalization of phenomena into binaries, the context for the use of natural resources of all kinds to produce knowledge defies a neat classification into pigeon holes, whether they be created by intellectual property (e.g. patents, copyrights, trademarks, etc.) or by Western science (e.g. active ingredients, chemicals, biology, biotechnology, etc.).<sup>62</sup> There are not many places in which this conceptual muddle is heightened more than at the intersection of GRs, TK, TCEs, and intellectual property. In Non-Western cosmovisions, knowledge and the production of knowledge is a complex cultural process that is linked to a people and their inalienable multifarious relationships with land and other natural phenomena.<sup>63</sup> Knowledge production is a continuum with no fixed tenure or classical proprietary entitlement *per se*, and it is at the core of the dynamism of cultures and civilizations. For example, songs, rituals, incantations, dreams, dreaming, and various other aspects of expressive culture are often produced or inspired in the context of uses of natural resources as sites of complex

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<sup>62</sup> See *Suspect Orthodoxy*, *supra* note 8.

<sup>63</sup> See Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 *IND. L. REV.* 1291, 1302–03 (2001).

relationships and experiences.<sup>64</sup> These experiences, as a holistic matter, inspire and are inspired by various forms of corporeal artistic creativity in carvings, weavings, designs, paintings, and endless genres of creative repertoire.<sup>65</sup>

Compare the above to Non-Western cosmivision or the ideation of intellectual property. Aside from its economic market undertone, intellectual property is premised on the demarcation of sites for knowledge production, for instance, between industrial property and copyright.<sup>66</sup> It then identifies unique categories such as patents, trademarks, designs, and, of course, copyrights with tight prescriptive eligibility criteria for protection. Even though conventional intellectual property recognizes the overlap of categories of intellectual property, the overlap is hardly reconcilable to IPLC worldviews. Rather, the overlap is a strategy for doubling down on stronger intellectual property protection. For example, depending on their forms of rendition, innovations around genetic resources could be protected by both patents and copyrights. However, in many IPLCs, the straitjacket categories of intellectual property regimes are not easily reconcilable with the broad holistic framework in which knowledge is produced and phenomena engaged. The broad holistic framework reifies the fusion between the agencies of the individual and the community and the holistic dynamic in relationship and interaction of all phenomena in the knowledge production process as a cultural experience with broad ramifications for the unique

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<sup>64</sup> Chidi Oguamanam, *Wandering Footloose: Traditional Knowledge and the 'Public Domain' Revisited*, 21(5-6) J. WORLD INTELL. PROP. 306, 325 (2018).

<sup>65</sup> *Id.*

<sup>66</sup> That binary frame is quickly losing its relevance in the post-digital world where claims to rights on complex streams of innovation no longer conform to the logic of copyright and other categories.

identity of IPLCs and their aspiration of self-determination.<sup>67</sup>

At early onset of WIPO-IGC, it made a pragmatic decision to demarcate its work into three tracks: Genetic Resources, Traditional Knowledge, and Folklore (i.e. TCEs). A few factors account for this decision as a practical matter. First, even though the IGC had the flexibility to depart from it, the tripartite track is consistent and logical with its name and mandate. Second, WIPO-IGC is the forum that embarked on the harmonization and conceptual appraisal of all aspects of TK and its manifestations with a view towards developing shared international understanding. Previous attempts have taken a segmented approach across multiple international fora and regimes, each with its own jurisdictional limitations.<sup>68</sup> The IGC was perhaps one of the first attempts to focus on these subjects in a collective manner, albeit with sensitivity towards developments in other fora. It has since executed its mandate, first from an elaborate conceptual exploration, and subsequently, as a robust negotiation process. The third and perhaps most cogent reason, is that the fundamental mandate of WIPO is the promotion and protection of intellectual property.<sup>69</sup> By virtue of serving as

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<sup>67</sup> See Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 TEX. WESLEYAN L. REV. 207, 208 (2009). See generally Johanna Gibson, *Community Resources: Intellectual Property Systems, Traditional Knowledge, and the Global Legal Authority of Local Community*, in *MANAGING THE COMMONS: INDIGENOUS RIGHTS, ECONOMIC DEVELOPMENT AND IDENTITY* 42 (Leticia Merino & Jim Robson eds., Instituto Nacional de Ecologia 2005).

<sup>68</sup> See, e.g., *Model Provisions*, *supra* note 30.

<sup>69</sup> See Convention Establishing the World Intellectual Property Organization, art. 3(i) July 14, 1967 (amended Sept. 28, 1979)

a forum for IGC, WIPO is inclined to interpret that IGC mandate specifically based on how the text-based instrument(s) for the protection of GRs, TK, and TCEs relate to intellectual property as a regime of reference.

From the outset, the tripartite frame of IGC animates a conceptual divide not only with respect to the segmented versus holistic tenor of the subject matters but also to the extent to which expected instruments would, on one hand, reinforce or reflect IP fundamentals, or on the other, deviate from them. While non-demandeur countries take conceptual approaches in which the instruments will be framed similarly to the IP model of knowledge governance, their demandeur counterparts (including the African Group, and certainly, the Indigenous Caucus) insist that IGC instrument(s) reflect the *sui generis* nature of the subject matters as a departure from being framed in the image of conventional intellectual property rights. After all, it is in part the failure of fitness of TK to IP and vice versa that yielded the quest for a just and fair model of protection for GRs, TK, and TCEs.

These two pathways—segmented vs holistic and IP-centered vs *sui generis* approaches—are touchstones for tension across virtually all articles in the draft instruments. They have shaped the structure of the emergent tripartite texts to date. However, it needs to be pointed out that while the IGC followed the stream of negotiating three instruments under the GRs, TK, and TCEs schemes, that approach remains a logical response to its mandate. It is not, however, conclusive or indicative of the ultimate outcome from the forum. The mandate itself continues to evolve. In its current state (the 2018/2019 mandate) the

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[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_250.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_250.pdf) [https://perma.cc/C2KP-8BHK].

committee is tasked with “reaching an agreement on an international legal instrument(s), *without prejudging the nature of outcome(s), relating to intellectual property* (emphasis added) which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).”<sup>70</sup> It is still feasible, albeit unlikely, that at the end of the process the nature of the instruments and outcomes from the IGC may be different from the current tripartite framework of the negotiations. Also, the mandate is unmistakable in that the instrument(s) and outcome(s) must *relate* to intellectual property. The reference to “without prejudice to nature of instruments” is to the ultimate status of the instruments as binding or non-binding.<sup>71</sup>

### III. PART III

#### A. *Structure and Specifics of Critical Articles in WIPO-IGC Draft Instruments*

From 2009 to the present, the IGC has generated consolidated documents and draft texts on GRs, TK, and

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<sup>70</sup> World Intellectual Property Organization [WIPO], *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, at ¶ (a), (Oct. 2-11, 2017), [https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_2018-2019.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf) [<https://perma.cc/SVR2-PWJ8>].

<sup>71</sup> The United States leads the extreme range of non-demandeurs’ positions in most of the issues that widen the gaps with demandeurs. One of its lead delegates, Dominic Keating, supports an outcome where the instrument(s) would be non-binding. See Dominic Keating, *The WIPO IGC: A US Perspective*, in *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE*, 265, 273 (Daniel F. Robinson et al. eds., Routledge 2017).

TCEs.<sup>72</sup> Each of these texts has sometimes been negotiated on an alternating basis throughout the renewed biennial mandates and program of work of the committee.<sup>73</sup> Only recently, at the IGC 39 in March 2019 did the committee attempt a parallel negotiation of the TK and TCEs texts in the same sessions.<sup>74</sup> The GRs text was the most mature of the three as of June 2018, courtesy of the 36th session of the committee which resulted in the most advanced text of GRs despite an attempt by the United States to block the text.<sup>75</sup> Sensing the frustration by an overwhelming majority of delegates arising from the US' action as palpable evidence of an existential threat to the IGC, IGC Chair Ian Goss (Australia) decided based on that single act

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<sup>72</sup> See World Intellectual Property Organization [WIPO], *Consolidated Document Relating to Intellectual Property and Genetic Resources*, WIPO/GRTKF/IC/40/6, (Apr. 9, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=433262](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=433262) [<https://perma.cc/65KM-6ZXE>] [hereinafter *GR Text*]; World Intellectual Property Organization [WIPO], *The Protection of Traditional Knowledge: Draft Articles*, WIPO/GRTKF/IC/40/4, (Apr. 9, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=433260](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=433260) [<https://perma.cc/T3J9-3HKQ>] [hereinafter *Draft TK Articles*]; World Intellectual Property Organization [WIPO], *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/40 /5, (Apr. 9, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=433261](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=433261) [<https://perma.cc/5NVD-A2UP>] [hereinafter *Draft TCEs Articles*].

<sup>73</sup> The mandate of the IGC has consistently been renewed, but in the later part of 2014 the committee went on hiatus. It did not conduct business for all of 2015. It resumed for the 31st session in September 2016.

<sup>74</sup> This was made possible through the work of the joint Ad Hoc Expert Group on Traditional Knowledge and Traditional Cultural Expressions which met on March 17, 2019 ahead of the IGC 39. See World Intellectual Property Organization [WIPO], *Draft Program for the Thirty-Ninth Session*, (Mar. 5, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=430217](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=430217) [<https://perma.cc/WH7Z-CR3N>].

<sup>75</sup> Chidi Oguamanam, *US Fails to Block Progress Over Genetic Resources Text at WIPO-IGC 36*, ABS CANADA BLOG (July 7, 2018), <https://www.abs-canada.org/news/us-fails-to-block-progress-over-genetic-resources-text-at-wipo-igc-36> [<https://perma.cc/C94M-XHQJ>].

to generate a Chair’s text on GR.<sup>76</sup> The Chair’s text was proposed as a working document and supplement to pre-IGC 36 GRs text.

The three IGC texts all follow nearly the same structure except for a few variations that reflect the nature of the subject matter of specific instruments.<sup>77</sup> The structure of the instruments generally addresses issues in the following order: definitions/use of terms, preambles/objectives or guiding principles, subject matter, eligibility criteria, beneficiaries, scope/conditions for protection, relationship of draft instruments with related international agreements, transboundary cooperation in the administration of the instruments, sanctions and remedies, exceptions and limitations, and disclosure requirement.<sup>78</sup> In a deliberately selective manner, the following subsection explores the tension in the negotiating dynamic regarding

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<sup>76</sup> See World Intellectual Property Organization [WIPO] & Mr. Ian Goss, Chair WIPO IGC, *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, (Apr. 30, 2019) [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_40/wipo\\_grtkf\\_ic\\_40\\_chair\\_text.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chair_text.pdf) [<https://perma.cc/AHY8-DQ3A>] [hereinafter *Chair’s GR Text*].

<sup>77</sup> For example, the TK and TCEs texts follow a more reconcilable pattern than the Consolidated Text of IP and GRs taking into account the narrow focus on the GRs text on Patent and the emphasis on disclosure of origin and source.

<sup>78</sup> For example, disclosure of source of origin of TK/GRs does have the same significance in the TCE text as it does in the GRs text. Similarly, tiered and differentiated approaches as an issue of scope of protection does not arise in the GR text as it does in the TK and TCE texts. Discussions over disclosure apply only to the GR and TK texts. For more insights, see generally Margo A. Bagley, *Of Disclosure ‘Straws’ and IP Systems ‘Camels’: Patents, Innovation, and the Disclosure of Origin Requirement*, in *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 85 (Daniel F. Robinson et al. eds., Routledge 2017).

specific texts of the articles, identifying and providing explanations of the converging positions of the African Group, LMCs, and in some cases, Indigenous Caucus as demandeur negotiation blocs mostly in relation to non-demandeur blocs. References are to the texts of the 39th IGC on TK and TCEs as well as the Chair’s Text on GRs as adopted at the 40th session of the IGC (June 17<sup>th</sup> - 21<sup>st</sup>, 2019).<sup>79</sup> Here are the principal regional blocs in the WIPO-IGC negotiations: Group B, the European Union (EU), the Central European and Baltic States (CEBS), the African Group, the Indigenous Caucus, the Asia Pacific Group (APG), the Group of Latin American and Caribbean States (GRULAC) and the Like-Minded Countries (LMCs).<sup>80</sup> Group B, the EU, and the CEBS fall under the category of non-demandeurs. The rest, for all practical purposes, are demandeurs.

### **1. Preamble**

The preamble to an international instrument does a few things. It often provides substantive and historical context for the instrument, while also articulating overarching principles that inform the text of the instrument. Put differently, preambles map the orientation of the instrument and provide justification. Even though the preamble does not constitute a substantive part of the instrument, it is critically relevant to its interpretation by providing a “big picture” understanding of the minds of the

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<sup>79</sup> See *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72; *GR Text*, *supra* note 72; see also *Chair’s GR Text*, *supra* note 76.

<sup>80</sup> Group B is a coalition of a few industrialized countries, namely: Australia, Canada, Switzerland, and the United States. The Indigenous Caucus is made up of global Indigenous Peoples across geographical and geo-political divides. LMCs consist of a loose combination of non-demandeurs excluding the Indigenous Caucus, approximately one hundred and forty countries.

drafters.<sup>81</sup> Therefore, from a negotiation point of view, it is not surprising that the preamble language is contested. For negotiating interests, the preamble provides the first opportunity to set a direction for a preferred outcome. Further, it is an opportunity to preserve, consolidate, and reinforce preferred narratives or even the status quo on overlapping issues that feature in related instruments. Conversely, it can also be a chance to constrain the scope of an issue from a previous instrument or regime considered unfavorable to a negotiating interest or bloc.

Initially, a portion of non-demandeur countries were reluctant to accommodate reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in the preamble.<sup>82</sup> They opposed associating IGC instruments with UNDRIP.<sup>83</sup> Even African countries took an ambiguous position on indigeneity. Many countries of the African Group were receptive to the elements of the instrument, especially as they apply to TK, and did not oppose reference to UNDRIP in the preamble. The same is true regarding the African position on the use of the expression “Indigenous Peoples and Local Communities.” Many non-demandeur states, however,

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<sup>81</sup> Shane Chalmers, *The Beginning of Human Rights: The Ritual of the Preamble to Law*, 9 HUMANITY: INT’L J. HUM. RTS., HUMANITARIANISM, AND DEV. 107, 109 (2018).

<sup>82</sup> For example, in 2007, a bunch of countries such as Canada, Australia, New Zealand, and the United States (CANZUS) objected to the Declaration and refused to express support for it. However, in 2016, like Canada, all of these countries have since reversed course and are now in support of the Declaration.

<sup>83</sup> UNDRIP is perhaps the most audacious international statement of the rights of Indigenous Peoples, especially their right to self-determination. Many colonial states such as Canada, the United States, and Australia expressed reservation over the instrument based essentially on their historic opposition to the self-determination of Indigenous Peoples. However, over time their reservation has waned. They have since endorsed the instrument.

prefer Indigenous and Local Communities as part of the historical reluctance over Indigenous Peoples rights to self-determination. The right to self-determination is associated to “People.” The word “People” remains bracketed in the IGC texts as works in progress.

The nuances regarding UNDRIP and “Indigenous Peoples and Local Communities” aside, the African Group and the majority of demandeur states are reluctant to champion three clauses in the preamble which are vociferously promoted by non-demandeurs. The three texts of Draft IGC instruments<sup>84</sup> use the same language. It is reproduced here from the draft of the TK text:

Acknowledging that the protection of traditional knowledge should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of knowledge to the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.<sup>85</sup>

For the African Group and other demandeurs, the transfer and dissemination of knowledge to third parties and the promotion of social and economic welfare are not the overarching purposes of protection of TK. Historically, IP has supervised an unrequited transfer and dissemination of TK and its discredited market framework could not be relied upon to close the gap. The IGC is not a forum to reinforce that practice. Furthermore, reference to “balance of rights and obligations” was imported from the TRIPS

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<sup>84</sup> See *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72; *GR Text*, *supra* note 72; see also *Chair’s GR Text*, *supra* note 76.

<sup>85</sup> *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72.

Agreement as an attempt to inject the classical tension between IP right holders and users which the IP system has managed very poorly.<sup>86</sup> Ownership is the proprietary essence that drives classical IPRs. TK is animated by custodial and communal essence which are less proprietary. In that custodial and communal tenor, interests are negotiated in delicate balance between individuals, generations, the living, the dead, and a complex set of social and cultural groups<sup>87</sup> in which economic welfare may be secondary, if at all. Similarly, the African Group is not fazed by instrumental language in which TK/TCE protection would promote intellectual and artistic freedom, research, and other fair practices and cultural exchange. TK is an organic way of life for its various stakeholders as a source of their social cultural cohesion. It is inherently sustainable, embodies creative freedom, and is open to renewal and contact.<sup>88</sup> Attempts to manipulate TK, TCEs, and GRs to a given instrumental outcome may be counterproductive to their spontaneous and organic essence.

The second contentious language of the preamble refers to:

Recognizing and reaffirming the role the IP system plays in promoting innovation and creativity, transfer and dissemination of knowledge and economic development, to the mutual advantage of stakeholders,

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<sup>86</sup> Marrakesh Agreement, *supra* note 52, at art. 7.

<sup>87</sup> See CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY AND TRADITIONAL MEDICINE* 159–60 (University of Toronto, 2010).

<sup>88</sup> *See id.* 15–26 (describing the general nature of TK).

providers and users of traditional knowledge.<sup>89</sup>

In a way, this language of the instrument, along with the next contentious part of the preamble discussed below, seeks to locate the work of the IGC totally within the IP system. But that is at odds with how the African Group understands the IGC. In the view of the African Group, the IGC's work ought to take a *sui generis* tenor. After all, at the core of the rationale for the IGC is the lack of fitness of purpose of conventional IP with regard to the protection of TK, TCEs and GRs. However, the above language is sponsored by non-demandeur countries. It reflects their fixation on IP as a cardinal framework for the protection of TK, TCEs, and GRs. Courtesy of the IGC, the WIPO Secretariat has prepared and updated studies on the existing gaps at the international level over the protection of TK and TCEs.<sup>90</sup> Those gaps are largely identified in existing IP architecture and the IGC's work is a bold attempt to bridge the identified gaps. To that extent, the resulting instruments must not be IP instruments *per se*. However, the IGC's mandate expects the instruments resulting from the committee's work *relate* to IP. But the degree of that association or relation is a vociferously contested matter. That is different from the approach taken by the majority of non-demandeur states in the pursuit of

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<sup>89</sup> *Draft TK Articles, supra note 72; Draft TCEs Articles, supra note 72.*

<sup>90</sup> World Intellectual Property Organization [WIPO], *The Protection of Traditional Knowledge: Updated Gap Analysis*, WIPO/GRTKF/IC/40/7, (Apr. 9, 2019) [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=50424](https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424) [<https://perma.cc/5AHD-E5UX>] [hereinafter *Updated Gap Analysis 1*]; see also World Intellectual Property Organization [WIPO], *The Protection of Traditional Cultural Expressions: Updated Gap Analysis*, WIPO/GRTKF/IC/40/8, (Apr. 9, 2019) [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=50424](https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424) [<https://perma.cc/5AHD-E5UX>] [hereinafter *Updated Gap Analysis 2*].

preamble and objective clause language that actively seeks the protection of TK, TCEs, and GR *within* the IP system.

The vision of non-demandeur countries for protecting TK, TCEs, and GRs within the IP system explains their intense investments in the public domain, a vital principle that justifies term limitation on IP.<sup>91</sup> Ironically, contrary to their progressive pattern of promoting stronger IPRs at the expense of the public domain, when it comes to TK and TCEs, non-demandeur countries “constitute champions of the public domain.”<sup>92</sup> To this end, in the preamble to the TK and TCEs text, non-demandeurs largely support the following language or its refinement: “Recognizing the value of a vibrant public domain and the body of knowledge that is available for all to use, [and] which is essential for creativity and innovation [and the need to protect and preserve the public domain].”<sup>93</sup>

The idea of frontloading the public domain logic into the preamble of a draft instrument for the protection of TK and TCE has two basic ramifications. The first, which is obvious at this point, is that sponsors of the language are tied to protecting TK and TCE within the IP system. Second, and perhaps the most important ramification, which will become much clearer later, is that sponsors are interested in foisting a term limit on TK and TCEs in the manner of other regimes of IP.<sup>94</sup> For the African Group,

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<sup>91</sup> Ruth Okediji, *Traditional Knowledge and the Public Domain*, *CIGI Papers*, no. 176 (June 15, 2018) <https://www.cigionline.org/publication/s/traditional-knowledge-and-public-domain> [https://perma.cc/4MYR-43UR].

<sup>92</sup> Oguamanam, *Wandering Footloose*, *supra* note 64, at 13.

<sup>93</sup> *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72.

<sup>94</sup> See World Intellectual Property Organization [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, at ¶ 150, WIPO/GRTKF/IC/39/1

the cultural context for the production of TK and TCE is communal as well as complexly layered in that it links the past to the present and the present to the future, whereof there is no clear demarcation of when a specific TK and TCE comes into being.<sup>95</sup> In short, the term limit is alien to TK and TCEs, and it is part of the warrant for any instrument seeking its effective protection to have a *sui generis* status.<sup>96</sup> However, to argue that TK and TCEs are not amenable to a term limit is not to suggest that in their undergirding customary practices or legal traditions of their custodians, there is no approximation or appreciation of the public domain logic.<sup>97</sup>

## 2. Objectives

Within the broader jurisprudence of treaty interpretation, like the preamble, the objectives provide a sense of purpose and point to the direction of concrete goals the drafters intend the instruments to accomplish.<sup>98</sup> Objectives are supposed to articulate or capture the operative and practically achievable aims of a legal instrument. Unlike the preamble, the objectives are characteristically more concise with greater clarity and simplicity. The three IGC instruments reflect the exact tension we have seen already in the preamble. Indeed, in the objectives, those tensions become clearer. Specifically,

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8, (June 17, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=439061](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439061) [<https://perma.cc/8L5L-3UAP>].

<sup>95</sup> *Wandering Footloose*, *supra* note 64, at 314 (arguing that “there is no fascination or fixation with when knowledge was invented or who should have exclusive claims to it”).

<sup>96</sup> But see J. Janewa Osei Tutu, *An International Instrument to Protect Traditional Knowledge: Is Perpetual Protection a Good Idea?*, 50 IDEA 697 (2010), for a contrary perspective.

<sup>97</sup> See generally Oguamanam, *Wandering Footloose*, *supra* note 64.

<sup>98</sup> Michael Waibel, *Principles of Treaty Interpretation: Developed for and Applied by National Courts?*, 16/2015 U. OF CAMBRIDGE FAC. OF L. RES. PAPER at 4, (Apr. 2015) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2595681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595681) [<https://perma.cc/42HN-5H2H>].

non-demandeurs are far bolder in seeking an instrument that mimics the IP system. As a component of that disposition, it is important for them that protection of TK and TCEs must be tied with the advancement of the public domain.<sup>99</sup> There are currently three competing alternatives on objectives. The African Group supports simpler language to the effect that:

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- a. unauthorized and/or uncompensated uses of traditional cultural expressions; and
- b. the erroneous grant of intellectual property rights over traditional cultural expressions.<sup>100</sup>

While the African Group reiterates its inclination for a protection regime for TK and TCEs that relates to IP, that does not necessarily make such instrument an IP regime. On the contrary, the non-demandeur countries insist on protection *within* the IP system:

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<sup>99</sup> It was in realization that existing protections for TK and TCEs under the intellectual property system do not provide effective protection as required under the IGC mandate. As a consequence, IGC commissioned and constantly updates gap analysis studies that attempt to identify existing gaps which new instrument(s) for protection of TK and TCEs can plug. It is an exercise that simply underscores the necessity for a *sui generis* approach rather than seeking to negotiate another agreement or series of agreements that strictly mimic the IP system. For the latest version of the Gap Studies, see *Updated Gap Analysis 1*, *supra* note 90; *Updated Gap Analysis 2*, *supra* note 90.

<sup>100</sup> *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72.

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of indigenous peoples and local communities to: ...

b) to encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain.<sup>101</sup>

The question of whether TK/TCEs instruments are designed within the IP system or in relation to that system did not generate a rift in the GR context where it appears to have been resolved.<sup>102</sup> Along with other demandeur blocs, the African Group tentatively conceded to benchmark the GR text largely, but not exclusively, to patents.<sup>103</sup> With the reservation by the Indigenous Caucus and others, that

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<sup>101</sup> *Draft TK Articles*, *supra* note 72; *Draft TCEs Articles*, *supra* note 72.

<sup>102</sup> *See Chair’s GR Text*, *supra* note 76.

<sup>103</sup> *See* World Intellectual Property Organization [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, at ¶ 58, WIPO/GRTKF/IC/36/11, (June 25-29, 2018) [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_38/wipo\\_grtkf\\_ic\\_38\\_ref\\_36\\_11.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_38/wipo_grtkf_ic_38_ref_36_11.pdf) [<https://perma.cc/F56S-H6TH>] (observations of the WIPO IGC Chair); *Id.* at ¶ 107 (the submission of Switzerland on behalf of Group B); *Id.* at ¶ 164 (the submission of the delegation of South Africa, noting that “the narrow focus [of Article 4 of the Draft GR text] on patents was a result of compromise position”); *Id.* at ¶ 170 (the submission of the delegation of Nigeria, describing draft Article 4 as a “clear demonstration of flexibility [and] a big shift to limit it to patents”).

concession did not attract overwhelming support.<sup>104</sup> It was, however, a strategic concession designed to make progress on the GR text at the 36th IGC.<sup>105</sup> Unfortunately as indicated earlier, the United States blocked the resulting GR text, necessitating the subsequent adoption of the Chair’s text where the concession was affirmed and retained.

There are other competing tensions in the expression of the objectives. The African Group, the LMCs, and the Indigenous Caucus preferred objectives expressed in negative terms, that is—to prevent the practices of misappropriation, unauthorized, and uncompensated, uses of TK, TCEs, and GRs, which essentially captures the phenomenon known as biopiracy.<sup>106</sup> Alternatively, wishing to downplay and shake off the prevalence and burden of biopiracy, non-demandeur countries prefer objectives in a more positive language expressed as preventing “erroneous grant or assertion” of IPRs over TCEs or TK, and in the case of GRs, erroneous grants of patents.<sup>107</sup> For them, *so-called* biopiracy is a benign error of the patent system. To underscore the contested nature of these negotiations, most of the words in

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<sup>104</sup> See *id.* at ¶¶ 217–18 for the interventions of the delegations of the Tebtebba Foundation and InBraPi respectively.

<sup>105</sup> See *id.* at ¶ 238 (closing remarks of the delegation of Nigeria).

<sup>106</sup> See, e.g., World Intellectual Property Organization [WIPO], *Official Report of WIPO IGC 34*, WIPO/GRTKF/IC/34/14, at ¶ 62, (Mar. 26, 2018) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=402417](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=402417) [<https://perma.cc/8TXX-BVAN>] (remarks by the delegation of Ghana). *Contra id.* at ¶¶ 141, 233 (remarks by the delegation of the EU); World Intellectual Property Organization [WIPO], *Official Report of WIPO IGC 35*, at ¶ 68, WIPO/GRTKF/IC/36/REF/IGC 35 Report, (July 2, 2018) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=409657](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=409657) [<https://perma.cc/7LAW-P2VC>] (remarks of the delegation of the USA); *Id.* at ¶ 69 (the delegation of Indonesia); *Id.* at ¶ 81 (the delegation of the Plurinational State of Bolivia).

<sup>107</sup> See generally *Draft TK Articles*, *supra* note 72, at 7.

the quote above—associated with the preamble text and several others introduced in the instruments—are subjects of disputes about their appropriate definitions as reflected in the definition or use of terms sections of the instruments. Those disputes, in all their subtleties, reflect the divergence of interests across the above-mentioned negotiating blocs.

### **3. Eligibility Criteria/Subject Matter of Protection**

In the nature of IGC negotiations, the simplest of issues seem to be the most complicated. The delegations leave nothing unquestioned and nothing uncontested. There is no room for presumptions. For example, given the mandate of the committee—to negotiate international legal instruments for the effective protection of TK, TCE, and GR—it follows that the subject matter of the instrument is self-evident. That explains the African Group’s support, with LMCs and the Indigenous Caucus,<sup>108</sup> of the simple text that reads as follows: “This instrument applies to traditional knowledge” as reflected in the texts of TK and TCEs from IGC 38.<sup>109</sup>

However, the non-demandeurs pushed for a more complicated pathway that merged the subject matter of protection with eligibility criteria for protection.<sup>110</sup> In

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<sup>108</sup> See, e.g., Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 61 (Indonesia), 62 (Ghana), 64 (Senegal), 65 (Egypt), 71 (Uganda).

<sup>109</sup> World Intellectual Property Organization [WIPO], *Protection of Traditional Knowledge: Draft Articles*, at 9, WIPO/GRTKF/IC/38/4, (Dec. 10, 2018) [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=46446](https://www.wipo.int/meetings/en/details.jsp?meeting_id=46446) [<https://perma.cc/GGC7-E24E>]; see also World Intellectual Property Organization [WIPO], *Protection of Traditional Cultural Expressions*, at 7, WIPO/GRTFK/IC/38/5, (Dec. 10, 2018) [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=46446](https://www.wipo.int/meetings/en/details.jsp?meeting_id=46446) [<https://perma.cc/GGC7-E24E>] (reading, “This instrument applies to traditional cultural expressions.”).

<sup>110</sup> Article 3 was retitled “[Protection Criteria/Eligibility Criteria]” (brackets in original).

regard to the latter, they prefer to specify a litany of eligibility criteria that have to be met on a cumulative basis by each of the subject matters (TK and TCEs) before they could be accorded the status of what the USA characterizes as “protected” traditional knowledge or “protected” traditional cultural expressions.<sup>111</sup> This resort to a prescriptive range of criteria is premised on the argument that not all TK and TCEs warrant protection. As well, it reflects the reluctance of non-demandeurs to be held accountable over ongoing “abuses,” “misappropriation,” or “unauthorized” uses of TK, TCE, and GRs as may be applicable. In this regard, protection is extended to TK/TCEs that are “created, generated, received, or revealed” by IPLCs, “developed, held, used, and maintained collectively by them” and which are “linked with” or constitute an “integral part” of their cultural and social identity, traditional heritage, transmitted between or from generation to generation, whether consecutively or not *for a term not less than fifty years or five generations.*<sup>112</sup>

It would appear that the African Group and every other negotiation bloc, except the non-demandeurs (Group B, EU, and CEBs), oppose the idea of elaborating on the criteria for eligibility under different subject matters.<sup>113</sup> Apart from the inherent exclusionary nature of that approach, it is grossly inefficient from a drafting

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<sup>111</sup> See Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 152, 155, 169.

<sup>112</sup> *Draft TK Articles*, *supra* note 72, at 8; *Draft TCEs Articles*, *supra* note 72, at 7.

<sup>113</sup> This is evident from the debate over the subject matter of protection and the injection of eligibility criteria for protection. From the report of the 34th IGC, it is clear that the African Group, LMCs, APG, etc. favor an inclusive and comprehensive definition of the subject matter of protection over the inclination of the US, EU, Group B, and CEBs. See, for example, Official Report of WIPO IGC 34, *supra* note 106, at ¶ 15 (the unopposed statement of Indonesia on behalf of APG).

perspective, especially given the fact that virtually all but one of the criteria are already part of the definitions of the subject matters (TK and TCEs) under the Use of Terms section.<sup>114</sup> Perhaps the most provocative part of this approach by the non-demandeurs, in the opinion of the African Group, is the arbitrary and brazen imposition of fifty years—or the so-called five generation—as a base period in which a given TK or TCE must be used uninterrupted by the IPLC before it could be eligible for protection.<sup>115</sup> This singular issue smacks of barefaced insensitivity to TK and its custodians at worst. At best, it resonates as a provocative demonstration of “deliberate ignorance” over TK and TCEs. It embeds a total package of misleading assumptions and misperceptions of TK and TCEs.

First, while it does not directly benchmark TK to a term limit, it undermines the incremental process of TK generation as a continuum of IPLCs’ dynamic ways of life. Second, it presumes to accurately locate the advent of contemporary or emergent forms of TK within a transgenerational continuum. For IPLCs, determining when TK or TCEs came into being is not only a culturally insensitive exercise, it is an inexact science.<sup>116</sup> Third, it presumes that such contemporary or emergent TK could then be isolated or diverged and be open to exploitation by everyone unless IPLCs take on the added burden of keeping it exclusive. That scenario contrasts with conventional time-sensitivity over the operation of IPRs

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<sup>114</sup> *Draft TK Articles, supra* note 72, at 4–5 (establishing the arbitrary reference to fifty years or five generations, which was proposed by Japan and supported, predictably, by the United States and South Korea).

<sup>115</sup> *See* Official Report of WIPO IGC 34, *supra* note 106, at ¶ 62 (intervention of the delegation of Ghana).

<sup>116</sup> *See supra* note 95 and accompanying text.

(e.g. copyright and patent) which come into effect upon the creation of a work or the filing of a patent for an invention.<sup>117</sup> Not only do the proponents of fifty years or five generations not offer a rational justification for the choice of that number, they also seem even more confused with regard to the alternative of five generations, which is an inexact and vague time reference.<sup>118</sup> Fifty years does not equate to five generations by any matrix.<sup>119</sup> This demonstrates the provocative nature of the proposal, which its proponents have since elevated to a decisive part of the negotiations. For the African Group, Indigenous Caucus, and the LMCs, this arbitrary eligibility criteria is a potential deal-breaker.

#### **4. Beneficiaries of the Instrument**

Again, the more straightforward issues appear during the IGC negotiations, the more complicated they become. The first assumption often made is that the beneficiaries of the instruments resulting from the work of the committee would be IPLCs. After all, IPLCs are the producers and custodians of TK, TCEs, and GRs. That observation is reinforced by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which is unequivocal over the rights of Indigenous Peoples in their knowledge.<sup>120</sup>

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<sup>117</sup> Under the common law, copyright protection automatically commences upon the creation of eligible work while priority over statutory protection of a patent is dependent on the date of filing or date of invention subject to the public disclosure rules.

<sup>118</sup> *E.g.*, World Intellectual Property Organization [WIPO], *Official Report of WIPO IGC 38*, at ¶ 145, WIPO/GRTKF/IC/38/16, (Mar. 22, 2019) [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=431501](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=431501) [<https://perma.cc/A3L3-VKVH>] (the intervention of the representative of the Tulalip Tribes from Washington State).

<sup>119</sup> *Id.*

<sup>120</sup> *See* G.A. Res. 61/295, art. 13, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

But in the context of the IGC, that line of reasoning must be moderated by other considerations. First is that related instruments, such as the CBD, specifically recognize the sovereign right of states over genetic resources (“GRs”) found within their national borders.<sup>121</sup> GRs are an indispensable site for the production of TK, and to some extent, TCEs.<sup>122</sup> By virtue of that sovereign right over GRs, states are stakeholders in the protection of GRs and, by extension, TK and TCEs. Consequently, states could qualify as “beneficiaries,” a term not defined in any of the draft instruments. Second, the issue of indigeneity is not one that invokes a uniform experience across states. Indigeneity in Africa is a complex and layered concept with most African states remaining ambivalent on the subject.<sup>123</sup> Compared to states such as Canada, Australia, New Zealand, and the United States (CANZUS), in many countries of the global south (which in the IGC includes the African Group, the APG, the LMCs, etc.), the states have a proactive and direct role to play in the protection of TK, TCEs, and GRs.<sup>124</sup> Even where Indigenous Peoples exist in the countries of the global south or Africa specifically (for example Kenya, Tanzania, South Africa, Nigeria, Congo, etc.), IPLCs do not enjoy the degree of autonomy or, perhaps more appropriately, distinct identity that their counterparts have in CANZUS states. In those contexts, states are naturally more proactive over the protection of TK, TCEs, and GRs which are often perceived as part of the patrimony of the nation state. Consequently, states take

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<sup>121</sup> United Nations Conference on Environment and Development: Convention on Biological Diversity art. 3, *opened for signature* June 5, 1992, 31 I.L.M. 818.

<sup>122</sup> McManis, *supra* note 21, at 246.

<sup>123</sup> See Michaela Pelican, *Complexities of Indigeneity and Autochthony: An African Example*, 36 AM. ENTHOLOGISTS 52 (2009).

<sup>124</sup> A majority of the citizens in these states make natural claims to being “indigenous” to the territories in a very loose and literal sense of the expression.

on logical, even suspect roles in some quarters<sup>125</sup> as both facilitators and beneficiaries of the protection of TK, TCEs, and GRs.<sup>126</sup>

Third is that there are instances of transboundary GRs and transboundary TK and TCEs, or cases where there is no clear IPLC to lay claims to specific applications of TK, TCEs, or GRs. In such cases, states are required to play a role in one capacity or another that could also place them in the position of beneficiary, even if on a marginal or nominal scale. The argument for vesting the exclusive benefit from the protection of TK, TCEs, and GRs on IPLCs reflects the sentiments in some quarters that when states assume an overly proactive role and beneficial status, they tend to deprive IPLCs of their rights.<sup>127</sup> When states are proactively projected as champions or beneficiaries of the protection of TK, TCEs, and GRs, they are perceived as acting no better than entities that indulge in biopiracy.<sup>128</sup> Such reservation is part of the long-running suspicion and mistrust that characterizes the relationship of the colonial Westphalian state with IPLCs.<sup>129</sup>

Aside from the contested position of states as beneficiaries of protection, non-demandeur countries are inclined further to place hurdles on IPLCs before they could be affirmed as beneficiaries. In this regard, they

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<sup>125</sup> Graham Dutfield, *TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge Protection*, 20 J. WORLD INTELL. PROP. 5, 148 (2017).

<sup>126</sup> On the dichotomous nature of the indigeneity experience and its ramifications for protection of TK in the Global South and North, see Chidi Oguamanam, *Protecting Indigenous Knowledge in International Law: Solidarity Beyond the Nation-State*, in CHALLENGING NATION, 191, 214 (8th ed. 2004).

<sup>127</sup> See Dutfield, *supra* note 125.

<sup>128</sup> Dutfield, *supra* note 125.

<sup>129</sup> Dutfield, *supra* note 125, at 148.

inject aspects of the eligibility criteria to be met by IPLCs into their preferred text. The topmost of their choices of three alternatives drafts under beneficiaries is as follows: “Beneficiaries of protection under this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.”<sup>130</sup> In essence, IPLCs have the burden to prove that they fulfil all of the stated criteria before they could benefit from the protection.

An important aspect of the negotiation on beneficiaries is that it marks one of the not-too-often instances where a majority of non-demandeur countries are in agreement with the Indigenous Caucus over their collective preference that IPLCs should be the beneficiaries.<sup>131</sup> On the other hand, the African Group and LMCs have been inclined to pursue drafting language that could accommodate the state and perhaps other stakeholders as beneficiaries. They favour two approaches, one is to have beneficiaries defined to include states or nations, and the other is to enumerate or identify the beneficiaries in-text.<sup>132</sup> That approach is reflected in two draft texts as follows: (1) “The beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries, as may be determined by under national law.”; and (2) “The beneficiaries of this instrument are indigenous [peoples], local communities, and other

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<sup>130</sup> *Draft TK Articles*, *supra* note 72, at 8; *Draft TCEs Articles*, *supra* note 72, at 9.

<sup>131</sup> See generally Official Report of WIPO IGC 34, *supra* note 106.

<sup>132</sup> For a convergence of views on this across the African Group and LMCs, see Official Report of WIPO IGC 34, *supra* note 106, at ¶ 76 (Indonesia on behalf of LMCs), ¶ 77 (Senegal on behalf of the African Group), ¶ 79 (China arguing for other beneficiaries where there is “no notion” of Indigenous Peoples), ¶ 81 (Ghana), ¶ 85 (Australia), ¶ 86 (Egypt arguing for “any beneficiaries”).

beneficiaries, [such as states [and/or nations]], as may be determined under national law.”<sup>133</sup>

In a curious way, rather than to the subject matters: TK and TCEs, “beneficiaries” are referenced to the instruments, hence “beneficiaries of this instrument.” This narrow approach helps to keep the focus on IPLCs, the historic victims of the exploitation of TK, TCEs, and GRs.<sup>134</sup> There is no question that IPLCs’ interest will take priority in the work of the IGC, but that should not come at the expense of a holistic view of “benefits.” Everyone is a stakeholder and beneficiary of effective protection of TK, TCEs, and GRs. Effective protection promotes the sustainability of TK, TCEs, and GRs, which is also tied to the survival and self-determination of IPLCs. It helps to strengthen the economic and non-economic aspects of the TK and TCEs as knowledge systems, lifting many from poverty in the context of human dignity while simultaneously supporting epistemic pluralism globally with multiplier effects.<sup>135</sup> Protection of TK, TCEs, and GRs strengthens and benefits the entire society on a win-win scale. In short, the benefits transcend the beneficiaries.

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<sup>133</sup> *Draft TK Articles*, *supra* note 72, at 8; *Draft TCEs Articles*, *supra* note 72, at 9.

<sup>134</sup> See generally GLOBAL BIOPIRACY, *supra* note 44.

<sup>135</sup> See Jérémie Gilbert & Corinne Lennox, *Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development*, 23 INT. J. HUM. RTS. 104, 106 (2019), available at <http://doi.org/10.1080/13642987.2018.1562921> [<https://perma.cc/JKG8-5MH2>]; see also TAHU KUKUTAI & JOHN TAYLOR, *INDIGENOUS DATA SOVEREIGNTY: TOWARDS AN AGENDA* 238 (Sydney: ANU Press, 2016), available at <http://dx.doi.org/10.22459/CAEPR38.11.2016> [<https://perma.cc/YHM5-VR94>].

Unfortunately, this all-important fact is lost in the hair-splitting (even if important) debate on beneficiaries.<sup>136</sup>

### **5. Scope of Protection or the Conditions for Protection**

This item has the most verbose provision in the draft texts of the TK and the TCEs.<sup>137</sup> It is also perhaps the most contentious of all the heads of issues under negotiation. The first item of dispute is whether protection would aim at safeguarding economic and moral rights of beneficiaries over TK and TCEs, or whether it would protect their economic and moral interests. On a broad scope, both non-demandeurs and the demandeurs, including the African Group, agree on the protection for economic right attached to TK and TCEs. However, they diverge with regard to whether the “moral rights” or “moral interests” of beneficiaries ought to be protected.<sup>138</sup> Predictably, non-demandeurs prefer the language of moral rights which is aligned to an established understanding of those rights as a bundle of inalienable residual rights of authors or other actors in the creative space, including the

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<sup>136</sup> See World Intellectual Property Organization [WIPO], *Official Report of WIPO IGC 36*, at ¶ 47, WIPO/GRTKF/IC/38/REF/36/11 (Dec. 18, 2018) (note from the WIPO Secretariat).

<sup>137</sup> Article 5 of *The Protection of Traditional Knowledge: Draft Articles*, WIPO/GRTKF/IC/40/4 (titled “Scope of [and Conditions of] Protection,” brackets in original) has four alternatives, each with almost twenty paragraphs of clauses, sub-clauses, and miscellaneous details running up to two pages. *Draft TK Articles*, *supra* note 72. Article 5 of *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/40/5 (titled “Scope of [Protection]/[Safeguarding]” brackets in original) is even more complicated with three alternatives, each with multiple sub-options and twenty-nine paragraphs of clauses, sub-clauses, and miscellaneous details running up to more than two and a half pages. *Draft TCEs Articles*, *supra* note 72.

<sup>138</sup> See divergent views on the interface of moral rights and moral interests as they relate to the interests of IPLC in the Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 34, 51, 95, 98.

rights of attribution and prohibition from derogation, etc.<sup>139</sup> Those are not subject to the exhaustion doctrine in intellectual property law (i.e. they continue to be in effect even after property rights has passed to third parties). Moral rights are empowering for the scope of protection of TK and TCEs. But the African Group and Indigenous Caucus, as well as members of other demandeur negotiating blocs, believe that, as an intellectual property right concept, moral rights do not adequately reflect complex layers of interests implicated in TK and TCEs. These rights include spiritual, sacred, and other inexplicable symbolisms that IPLCs associate with TK and TCEs.<sup>140</sup> Those interests—for want of a better expression—which are part of the complex cosmivision of IPLCs, run with and are not detachable from TK and TCEs. They are captured in the more pliable and malleable phrase “moral interests;” which is *sui generis* in reference to TK and TCEs.

Non-demandeurs favour a negative exclusion of the scope of protection open to TK and TCEs. Part of their strategy is to use the logic of the public domain under intellectual property to constrain TK and TCEs.<sup>141</sup> The consistent inclination of non-demandeur states is to insist upon the use of core intellectual property doctrines, such as the public domain and moral rights, as a strategy for

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<sup>139</sup> Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 34, 51, 95, 98.

<sup>140</sup> As a depiction of this sentiment, see the contribution of the representative of the Tulalip Tribes in the Official Report of WIPO IGC 34, *supra* note 106, at ¶ 98.

<sup>141</sup> Echoes of this are evident in the interventions of the delegations of the European Union, Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 50, 102. These interventions contrast with those of the Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 108 (the delegation of the Tulalip Tribes), 11 (the delegation of Senegal for the African Group), 112 (the delegation of Indonesia for LMCs).

regulatory containment of TK and TCEs.<sup>142</sup> As well, it reflects the pivotal nature of the conceptual divide at the IGC among experts and across negotiation blocs. On one end, non-demandeurs favour delimiting the scope of protection of TK and TCEs as follows: “Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.”<sup>143</sup>

On another end, the African Group, LMCs, and the majority of non-demandeur countries have attempted a compromise approach under the “*tiered or differentiated approach*” to TK and TCEs.<sup>144</sup> The approach recognizes that some TK and TCEs are diffused to a varying degree as an evidentiary matter. As such, the extent and scope of the protection attached to such TK and TCEs will be a factor or the degree of their diffusion. The tiered approach also recognizes that contrary to the non-demandeurs’ tendency to capitalize on the fact that TK and TCE are in the public

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<sup>142</sup> *Id.*; see also *supra* note 138.

<sup>143</sup> *Draft TK Articles, supra* note 72, at 11; *Draft TCEs Articles, supra* note 72, at 11. The United States, Republic of Korea, Japan, and many non-demandeur states have continued to support this proposition which is consistent with their preference for an enumerative list of exceptions to the protection of TK and TCEs which stands in contrast to the position of non-demandeurs. Compare Official Report of WIPO IGC 34, *supra* note 106, at ¶ 188 (the interventions of the delegation of the United States), with Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 105 (the intervention of Senegal for the African Group), 106, 194 (Indonesia for the LMCs), and 188 (the Tulalip Tribes).

<sup>144</sup> See Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept*, CIGI PAPERS, no. 185 (Aug. 15, 2018) <https://www.cigionline.org/publications/tiered-or-differentiated-approach-traditional-knowledge-and-traditional-cultural> [https://perma.cc/X2G5-AWH3] [hereinafter *Tiered or Differentiated Approach*].

domain, there is need to examine the process through which they became so diffused as a pathway to entering the public domain.<sup>145</sup> It would, in their opinion, be counterproductive to the protection of TK and TCEs if the rights of IPLCs are extinguished just because they may have been illegally acquired by third parties and diffused without the free prior and informed consent and against the customary laws and protocols of IPLCs.<sup>146</sup>

The African Group, LMCs, and some frontline countries in the broader non-demandeur group have proposed roughly three tiers or differentiated categories of TK and TCEs, namely secret/sacred TK and TCEs, narrowly or partially diffused TK and TCEs, and widely diffused TK and TCEs.<sup>147</sup> With regard to the first category, the scope of the right of IPLCs is one of far higher exclusivity with regard to controlling the use of the knowledge and setting the terms of such use.<sup>148</sup> For the second category, parties have an obligation to ensure beneficiaries “receive [a] fair and equitable share of benefits” from the use of TK and TCEs, while users have responsibility to identify beneficiaries and ensure respect for the “cultural norms and practices of beneficiaries” associated with narrowly diffused TK and TCEs.<sup>149</sup> On the third tier, “Member States should use best endeavors [in consultation with indigenous and local communities,] to

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<sup>145</sup> For a detailed analysis of this, see *id.*

<sup>146</sup> The Indigenous Caucus illustrated this scenario with the story of how the Zia Sun Symbol became the flag of the State of New Mexico, as well as the state’s most visible insignia of identity. See Chidi Oguamanam, *WIPO IGC 39: Unraveling the Tiered Approach to TK/TCEs*, ABS CAN.: BLOG (Mar. 23, 2019), <http://www.abs-canada.org/events/wipo-igc-39-unraveling-the-tiered-approach-to-tk-tces> [<https://perma.cc/E5MH-XR79>].

<sup>147</sup> See *Tiered or Differentiated Approach*, *supra* note 144.

<sup>148</sup> See *Tiered or Differentiated Approach*, *supra* note 144.

<sup>149</sup> *Draft TK Articles*, *supra* note 72, at 11.

[protect the integrity of] [archive and preserve] [protected] traditional knowledge that is widely diffused [and sacred].”<sup>150</sup> It needs to be indicated that the Indigenous Caucus takes the view that virtually all TK and TCEs are sacred and that they are no less so even if they are widely diffused, especially where such diffusion was done without the free and prior informed consent of IPLCs. Also, the Caucus insists that the fragmentation of the people’s knowledge and their ways of life, first into TK, TCEs, and GRs, and now, further into tiered categories, is alien to their worldview.<sup>151</sup> The African Group shares those sentiments in principle but recognizes that the tiered approach is a pragmatic response to address concerns expressed by non-demandeurs for clarity over the scope of protection and the tendency to use the public domain argument to take the wind out of the sail of TK protection.<sup>152</sup> The African Group and other demandeur sponsors of the tiered approach have continued to refine the concept, as an ongoing matter, through the IGC negotiations in order to accommodate the concerns of the Indigenous Caucus and others. Specifically, the Caucus insists that unauthorized diffusion and use of TK and TCE (i.e. where TK and TCEs are publicly available in the context of commercial exploitation without the authorization of the beneficiaries) has consequences—the least of which is for parties to ensure that such uses shall be

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<sup>150</sup> *Draft TK Articles*, *supra* note 72, art. 5, alternative 3, § 5.3 (brackets in original).

<sup>151</sup> See the remark of Tulalip Tribes’ (USA) representative, Preston Hardison, in the Official Report of WIPO IGC 34, *supra* note 106, at ¶ 52 to the effect that all TCEs (certainly TK) ought to be protected whether fragmented into “secret, sacred, closely held, publicly expressed or widely available” as the tiered approach seeks to do. On the issue of fragmentation of TK in international law, see Sun Thathong, *Lost in Fragmentation: The Traditional Knowledge Debate Revisited*, 4 *ASIAN J. INT’L LAW* 359 (2014).

<sup>152</sup> See *Tiered or Differentiated Approach*, *supra* note 144, at 6.

subject to appropriate intervention by Indigenous Peoples, with a view to negotiate even if retroactive or for reparative benefits.<sup>153</sup> The tiered approach is one example of the creative ingenuity of the committee’s work. It has been subject to extensive debate and scrutiny by various negotiating blocs, especially the coalition of non-demandeur states.<sup>154</sup> The latter insists on further clarification and elaboration of the tiered and differentiated concept in order to address concerns over its feasibility.<sup>155</sup> That process is ongoing, as the tiered approach is now a fully entrenched feature of the IGC negotiations.<sup>156</sup>

## 6. Disclosure Requirement

The simple logic of the disclosure requirement is premised on the fact that third parties mainly, but not exclusively from the non-demandeur countries, acquire GR and often TK of IPLCs.<sup>157</sup> They then utilize those in their research and development, transforming the resources and TK into subjects of new applications for IP, primarily, but not solely for patent applications.<sup>158</sup> Therefore, the issue of

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<sup>153</sup> See *Draft TK Articles*, *supra* note 72, art. 5, alternative 3; see also *Draft TCEs Articles*, *supra* note 72, art. 5, alternative 3, option 1, § 5.2.

<sup>154</sup> See *Tiered or Differentiated Approach*, *supra* note 144, at 6–8.

<sup>155</sup> *Tiered or Differentiated Approach*, *supra* note 144, at 6–8.

<sup>156</sup> *Tiered or Differentiated Approach*, *supra* note 144, at 7.

<sup>157</sup> Disclosure of TK or aTK remains a marginalized aspect of this debate. It is directly captured in an obscure provision in the Draft TK text titled “N[o] D[isclosure R[equirement,]” and specifies that “[p]atent disclosure requirements shall not include a mandatory disclosure requirement relating to traditional knowledge unless such disclosure is material to the patentability criteria of novelty, inventive step or enablement.” *Draft TK Articles*, *supra* note 72, art. 7, alternative 4.

<sup>158</sup> See Ikechi Mgeboji, *Patents and Traditional Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Biopiracy*, 6 *IND. J. GLOBAL LEGAL STUD.* 163 (2001). See generally TERRY TEN KATE & SARAH A LAIRD, *COMMERCIAL USE OF BIODIVERSITY* (2020).

the disclosure requirement is one that features directly and prominently in the GR and TK texts; less than it is featured in the TCEs.<sup>159</sup> This is because even though the uses of GRs in TCEs are not denied, GRs are primarily valorized in the TK realm, and vice versa.<sup>160</sup> Similarly, uses of GRs and TK engage the patent more than other IP and related regimes.<sup>161</sup> That fact now informs the overall orientation of the GRs text.<sup>162</sup> As pointed out earlier, the alignment of the GR text with patents is a strategic concession that the demandeurs made at the 36th IGC to ensure progress on the GR text.<sup>163</sup> Without disclosing the sources or origins of the GRs and aTK, it is hard to determine the extent to which their custodians contributed to the new innovation now subject of IPR in order to justify the interest of IPLCs to share in the credit for the resulting innovation and to partake in benefit sharing, where practicable (that is the trigger for disclosure).<sup>164</sup> Perhaps more than partaking in benefit sharing, disclosure of source or origin of GR and aTK enables the determination, in the first instance, of whether the claimed invention warrants recognition as IP, or whether it amounts to a misappropriation of GRs and

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<sup>159</sup> Disclosure takes more preeminence in the GR Text where the emphasis is on provenance of genetic resources as essentially but not exclusively tangible assets implicated in a proposed patent. See *Chair's GR Text*, *supra* note 76. However, the issue of disclosure arises in the context of use of traditional cultural expressions in design law. See Margo A. Bagely, "Ask Me No Questions": *the Struggle for Disclosure of Cultural and Genetic Resources in Design Law*, 20 Vand. J. of Ent. & Tech. 975 (2018).

<sup>160</sup> Aman Gebru, *Patents, Disclosure, and Biopiracy*, 96 DENV. L. REV. 535 (2019).

<sup>161</sup> World Intellectual Property Organization [WIPO], *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge* (2017), <https://www.wipo.int/publications/en/details.jsp?id=4194> [<https://perma.cc/83K2-QWLG>].

<sup>162</sup> See *Chair's Draft GR Text*, *supra* note 76.

<sup>163</sup> See *supra* note 103 and accompanying text.

<sup>164</sup> See *Chair's Draft GR Text*, *supra* note 76, at 9.

aTK and, by extension, the abuse of the IP system. For example, in the context of biopiracy, the claimed invention may not be novel or new, which is a primary requirement for patentability.<sup>165</sup> The claimed invention could well be in relation to the same uses of the GRs (or their cosmetic variation) associated with TK holders from time immemorial regarding which the would-be patentee now seeks to protect through an exclusive patent monopoly. That was precisely the case of the neem-related patents granted to the U.S. company, W.R. Grace in the 1990s, which was successfully opposed by a coalition of NGOs and stakeholders. The neem patent controversy,<sup>166</sup> as it was initially called, was one of the early flagship cases on biopiracy.<sup>167</sup> The same scenarios were also in place, to a large degree, in the cases of biopiracy involving African countries and local communities mentioned earlier.<sup>168</sup>

Unlike the African Group, Indigenous Caucus, LMCs, and kindred negotiating blocs, the non-demandeurs countries and affiliated blocs are not easily warmed up to the idea of disclosure of sources or origins of GRs and aTK.<sup>169</sup> They prefer to emphasize the problems, real or imaginary, associated with the requirement. The first line

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<sup>165</sup> See Mark A. Lemley, *Point of Novelty* (Stanford Public Law Working Paper No. 1735045, 2012) <https://ssrn.com/abstract=1735045> [<https://perma.cc/5HLD-Z4HP>].

<sup>166</sup> See Shayana Kadidal, *Subject-Matter Imperialism? Biodiversity, Foreign Prior Art and the Neem Patent Controversy*, 37 J.L. & TECH 371 (1997).

<sup>167</sup> See generally Deepak Debnath, *Analysis the Fight for Traditional Knowledge to Conform the Need of Documentation Relates to the 'Neem Case'* (2013), available at <https://ssrn.com/abstract=2259044> [<https://perma.cc/UW75-J4BW>].

<sup>168</sup> See *supra* note 46 and accompanying text.

<sup>169</sup> See the following submissions of the delegations of the following countries in the Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 24, 77 (Republic of Korea), 75 (Delegation of the USA), 76 (Japan).

of argument is that the disclosure requirement puts an undue burden on the patent system greater than it was designed to shoulder.<sup>170</sup> Secondly, there are concerns that origin and source are not always the same as they are hard to reconcile and susceptible to manipulation as a practical matter.<sup>171</sup> The third argument involves concerns around where origins and sources of GRs and aTK cut cross boundaries, a situation already accommodated in the Nagoya Protocol.<sup>172</sup> Given the complex variations within and across species—which is often a factor of subtle or sensitive, albeit fluctuating ecological traits—determining origins and sources, especially of GRs, is hardly an accurate science. Demandeurs favor an approach where national laws should determine or prescribe the details of disclosure of origin and source.<sup>173</sup>

The African Group supports a drafting approach that accommodates all of the concerns associated with the disclosure of origin on a pragmatic basis.<sup>174</sup> The current language requires disclosure by users or applicants (for intellectual property) of the country from which knowledge or GRs was collected or received and the origin of the GRs

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<sup>170</sup> Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 77 (Republic of Korea). This view is held by most non-demandeurs.

<sup>171</sup> See, e.g., Michelle Rourke, *On the Origin of Sample: Pathogen Provenance and the Rise of Material Transfer Agreement*, 3 J. SCI. & L. 1–3 (2017).

<sup>172</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, art. 10–11, U.N. Doc. UNEP/CBD/COP/DEC/X/1 (Oct. 29, 2010).

<sup>173</sup> See interventions in the Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 57 (Native American Rights Funds), 99 (Ghana as facilitator), 192 (South Africa), 201 (Niger).

<sup>174</sup> This is evident in the unanimity over the use of a dispute settlement option to manage disagreements arising from disclosure. Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 170, 200 (submissions of Nigeria), 187 (South Africa), 201 (Niger).

or aTK, if known, where it is different from the providing country.<sup>175</sup> Where the source or origin are both unknown, the applicant and user are also required to indicate “the immediate source” of the collection or receipt of TK or GRs as the case may be.<sup>176</sup> This is usually the case when GRs are collected from public reservoirs such as labs or seed banks, or where TK may have been acquired for *ex situ* uses in various informal and undocumented contexts. While non-demandeur countries insist on a disclosure regime that is non-mandatory, the Indigenous Caucus, African Group, and its demandeur allies maintain that disclosure should be mandatory.<sup>177</sup> This demand for mandatory disclosure is at the core of the GR text, because how successful could an instrument for the effective protection of TK and GR be if it does not require mandatory disclosure of the source or origin of GR and aTK? Due to this reality, the Chair’s text on GR endorses mandatory disclosure,<sup>178</sup> which is already the law in many demandeur countries such as South Africa, China, India, etc.<sup>179</sup>

Aside from the discord over the mandatory or non-mandatory nature of disclosure,<sup>180</sup> another area of tension is the consequences of non-disclosure. Again, the African Group and its demandeur allies back a stronger sanction for

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<sup>175</sup> *Draft TK Articles*, *supra* note 72, at art. 7, alternative 2, §7.2.

<sup>176</sup> *Draft TK Articles*, *supra* note 72, at art. 7, alternative 1, 2, § 7.2.

<sup>177</sup> For example, see the submissions of the following delegations in the Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 27, 162, 190 (Japan), 26 (Thailand), 23 (Tebtebba Foundation).

<sup>178</sup> *Chair’s Draft GR Text*, *supra* note 76, at art. 3, § 3.1(a)(b).

<sup>179</sup> See World Intellectual Property Organization [WIPO], *Disclosure Requirements Table*, (May 2019) [https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic\\_resources\\_disclosure.pdf](https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf) [<https://pe.rma.cc/JK68-KTT5>].

<sup>180</sup> See submission of the delegation of Ghana in the Official Report of WIPO IGC 36, *supra* note 136, at ¶ 224.

non-disclosure while non-demandeurs favor a slap on the wrist if not outright opposition.<sup>181</sup> However, years of negotiations have brought the parties closer from the extremes towards a middle ground, which includes pre-grant sanctions for patents and possibly other IPRs.<sup>182</sup> These are categories of sanctions that can be activated around the subject of disclosure before an intellectual property right (patent) is granted. On that count, parties have a number of options to avoid sanctions, including withdrawing from processing the application entirely, suspending the processing of the IP application until the disclosure requirement is satisfied, and prescribing a deadline for the disclosure obligation to be satisfied in a pending application.<sup>183</sup> If at the end of the deadline there is no disclosure, the application can be rejected.<sup>184</sup>

On post-grant sanctions, the African Group and demandeur allies, in principle, prefer a maximalist consequence after an IPR is granted without disclosure.<sup>185</sup>

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<sup>181</sup> Official Report of WIPO IGC 36, *supra* note 136, at ¶ 224 (Ghana), 156 (Brazil), 158 (South Africa), 159 (Nigeria), 162 (Morocco). *Cf.* Official Report of WIPO IGC 36, *supra* note 136, at ¶ 28 (submission from Japan arguing that “since mandatory disclosure requirement could negatively affect the present system and eventually hinder innovation, it should not be introduced”).

<sup>182</sup> See *Draft TK Articles*, *supra* note 72, at art. 7, alternative 2 (discussing pre- and post-grant sanctions); *Chair’s Draft GR Text*, *supra* note 76, art. 6 (discussing pre- and post-grant sanctions).

<sup>183</sup> *Draft TK Articles*, *supra* note 72, at alternative 3, art. 7.3.

<sup>184</sup> *Draft TK Articles*, *supra* note 72, at alternative 3, art. 7.3.

<sup>185</sup> See Official Report of WIPO IGC 36, *supra* note 136, at arts. 6–7; see also *Chair’s Draft GR Text*, *supra* note 76, at art. 3 and accompanying notes; World Intellectual Property Organization [WIPO] & Mr. Ian Goss, Chair, *Chair’s Information Note for IGC 38*, [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_36/wipo\\_grtkf\\_ic\\_36\\_ref\\_chair\\_info\\_note.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_36/wipo_grtkf_ic_36_ref_chair_info_note.pdf) [<https://perma.cc/8694-LSEJ>] (containing excerpts on how select demandeurs and non-demandeurs have dealt with disclosure requirements and the consequences of non-disclosure).

That sanction is the revocation of the patent or intellectual property right obtained without proper disclosure. There is a sense shared by some, especially non-demandeurs, that revocation could be counterproductive for the reason that once a patent premised on GR and aTK is revoked, a free-for-all situation arises with regard to the use of the GRs and the aTK in question. There is no assurance that IPLCs' interests could be protected in such a circumstance. On the other hand, stakeholders are open to more mitigating post-grant options that can be instituted and pursued outside the patent system.<sup>186</sup> For example, criminal or punitive sanctions such as fines could be a more appropriate option potentially at the national discretion of parties<sup>187</sup> as a form of compensatory liability model.<sup>188</sup> Ultimately, those options do not compromise the interests of IPLCs.

As a point of compromise, which is rare at the IGC, no negotiating bloc or member state, nor the Indigenous Caucus oppose two specific matters in the context of sanctions for non-disclosure.<sup>189</sup> The first is the use of alternative dispute resolution mechanisms in managing disagreement around disclosure, which was originally floated by the African Group.<sup>190</sup> The second is a consensus among experts that revocation could be an option of last

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<sup>186</sup> For example, see the submission of the delegations of the EU and Switzerland in the Official Report of WIPO IGC 36, *supra* note 136, at ¶¶ 110 and 112 respectively.

<sup>187</sup> *Draft TK Articles*, *supra* note 72, at art. 7, alternative 3, § 7.4.

<sup>188</sup> See Jerome H. Reichman, *A Compensatory Liability Regime to Promote the Exchange of Microbial Genetic Resources for Research and Benefit Sharing*, in *DESIGNING THE MICROBIAL RESEARCH COMMONS: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM* 43–53 (Paul F. Uhler ed., 2011).

<sup>189</sup> See generally Official Report of WIPO IGC 36, *supra* note 136.

<sup>190</sup> Official Report of WIPO IGC 36, *supra* note 136, at ¶ 198 (remarks by the delegation of Indonesia acknowledging South Africa and Brazil).

resort, notably where an applicant knowingly or fraudulently (or even both) provided false or misleading information regarding disclosure.<sup>191</sup>

Finally, a critical point that makes the issue of disclosure a make-or-mar one at the IGC is the “trigger.” Specifically, the trigger relates to the nature of the relationship between the claimed invention or intellectual property on the one hand, and GR and aTK on the other that could justify, or trigger, the need to disclose the source or the origin of GRs and aTK implicated in an IP claim or application.<sup>192</sup> The concept of the trigger recognizes that not all nexus’ between an invention and the uses of GR and aTK are significant enough to warrant disclosure. Delegates seem to agree that it is only where the claimed invention (in the case of a patent) or intellectual property (in other cases) results from direct physical contact with TK, GRs, or aTK, where applicable, that the disclosure requirement should be triggered.<sup>193</sup> Expectedly, the non-demandeur countries, especially the EU, US, Japan, the Republic of Korea, and Group B, favor language suggestive of a physical nexus between the invention, process, and product for which IP is applied, and the GR, TK, or aTK used. Consequently, they insist that the invention or IP must be *directly based* on or *directly use* GRs, TK, and aTK. The African Group and its allies are extremely reluctant about the language of the directly-based on trigger. They do not favor directly-based on the trigger

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<sup>191</sup> See *Chair’s Draft GR Text*, *supra* note 76; see also the Report of Ad Hoc Expert Group on Genetic Resources (as presented by Roffe and Kovacs) in the Official Report of WIPO IGC 36, *supra* note 136, at ¶ 41.

<sup>192</sup> Official Report of WIPO IGC 36, *supra* note 136, at ¶ 41 (“Trigger by Roffe”).

<sup>193</sup> See *Chair’s Draft GR Text*, *supra* note 76.

language. They argue that the language is biased in favor of physical access or connection between users and GRs.

Additionally, they argue that advances in biotechnology, especially progress in digital sequencing, are now such that information regarding GRs and even TK are rendered as part of the global data ecosystem where they are easily deployed in an invention, and subsequently, in an intellectual property application without directly or physically linking them to their sources and origins in IPLCs.<sup>194</sup> The African Group and allies insist that IGC instruments must accommodate that technological reality. Part of the alternative language under consideration is where innovation, process, or production for which IP is claimed is “based on,” “derives from,” or is “materially based” on GRs. These formulations are only worth their meaning as a matter of interpretation. The issue of the trigger was one of the thorniest the Chair had to deal with through his broad consultations with negotiating blocs before he issued the Chair’s text on GRs. The text of the GR instrument on the trigger is supplemented by an interpretive footnote on the meaning of “materially based on.”<sup>195</sup> The footnote reads as follows: “Where the claimed invention in a patent application is [*materially/directly*] based on GRs, each Contracting Party shall require

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<sup>194</sup> See Chidi Oguamanam & Vipal Jain, *Access and Benefit Sharing and Aboriginal Research Ethics After Nagoya Protocol: Digital DNA and Transformations in Technology* 3 J. ENVTL L. & PRAC. 79, 112 (2017).

<sup>195</sup> “[*Materially/Directly*] based on means that the GRs and/or Associated TK must have been necessary or material to the development of the claimed invention, and that the claimed invention must depend on the specific properties of the GRs and/or Associated TK.” *Chair’s Draft GR Text*, *supra* note 76, at 6 (brackets in original). Conceivably, this interpretation could be relevant and applicable in the context where GR, TK, and aTK is a subject of digital sequence information.

applicants to disclose:” the country of origin or the source of genetic resources.<sup>196</sup> It is possible that digitally sequenced genetic resource information may be the material or necessary basis for a patent claim even when underlying research did not involve direct physical access to IPLCs and their GRs.

## 7. Databases

Another important point of tension between demandeurs, including the African Group, and non-demandeurs, is the role of databases in the project for the protection of TK, GRs and, of course, aTK.<sup>197</sup> The debate over databases does not extend to TCEs as the relevance of databases is directly implicated in TK and GRs. In the era of digitization and information revolution, the collection of TK practices, innovation, and associated uses of GRs among IPLCs in various forms of datasets have become fashionable.<sup>198</sup> The practice of creating TK databases is largely a countervailing response to biopiracy; to starve off the opportunist presumption that since TK is not visible in written and conventional publications, it can be brazenly appropriated.<sup>199</sup> For instance, India pioneered the famous Traditional Knowledge Digital Library (TKDL), a

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<sup>196</sup> *Chair’s Draft GR Text*, *supra* note 76, at art. 3, § 3.1(a)(b) (brackets in original).

<sup>197</sup> See Report of Ad Hoc Expert Group on Genetic Resources (as presented by Roffe and Kovacs) in the Official Report of WIPO IGC 36, *supra* note 136, at ¶ 41 (Databases by Kovacs and Due Diligence by Roffe).

<sup>198</sup> See generally Chidi Oguamanam, *Indigenous Data Sovereignty: Retooling Indigenous Resurgence for Development*, CIGI Paper No. 234 (Dec. 5, 2019), <https://www.cigionline.org/publications/indigenous-data-sovereignty-retooling-indigenous-resurgence-development> [https://perma.cc/229G-N9QA].

<sup>199</sup> See generally Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 *IND. J. GLOBAL LEGAL STUD.* 489 (2008) [hereinafter *Digital Capture*].

meticulous scientific record of cardinal aspects of Indo-Pakistani medicinal heritage.<sup>200</sup> That project has since enhanced international patent classification to accommodate traditional knowledge-based prior art, in particular, traditional medicine.<sup>201</sup> The TKDL has facilitated the recognition of newly digitized information on traditional medicinal practices of Ayurveda, Unani, and Siddha, as unequivocal forms of prior art.<sup>202</sup>

Along with similar projects, in effect, databases serve as a form of defensive protection of TK. They demonstrate that some age-long traditional knowledge of the uses of GRs for medicinal applications which patent applicants, hitherto, passed as “new” does not pass the crucial test of novelty for patentability.<sup>203</sup> Bolstered integration of TK into the patent examination and overall patent integrity protocol reduces the practice of biopiracy or opportunistic appropriation of TK; by demonstrating that a particular TK is part of IPLC knowledge, databases of TK serve as a defense against appropriation and misappropriation. Nevertheless, such a defensive role served by databases does not necessarily translate to the explicit protection of TK. Practically, it is a quick way to expose TK, making it accessible even at no cost to those best positioned to exploit it without compensation.<sup>204</sup> In

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<sup>200</sup> See Chidi Oguamanam, *Documentation and Digitization of Traditional Knowledge and Intangible Cultural Heritage: Challenges and Prospects*, in *INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT* 357, 372–73, 373 n.63 (T. Kono ed., 2009) [hereinafter *Documentation and Digitization*].

<sup>201</sup> See *Digital Capture*, *supra* note 199.

<sup>202</sup> See generally *INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT* (T. Kono ed., 2009).

<sup>203</sup> See Lemley, *supra* note 165.

<sup>204</sup> See *Documentation and Digitization*, *supra* note 200.

other words, at best, it prevents third parties from obtaining patent rights over TK, but it does not foreclose other inappropriate uses of the knowledge by non-TK holders, which is what protection does.<sup>205</sup>

Like everything else, when it comes to the role of databases in the protection of TK, the devil hibernates in the details. Non-demandeurs capitalize on databases as vital sources of freely available information on TK, GRs, and aTK to advance their argument that a cardinal objective of any instrument(s) resulting from the IGC is promoting innovation, disseminating knowledge, and the recognition of a vibrant public domain.<sup>206</sup> Consequently, they favor strong language that mainstreams the use of databases as a critical measures-based necessity for the “protection” of TK, GRs, and aTK.<sup>207</sup> For the African Group and members of the demandeur bloc, databases are desirable, but they could be a double-edged sword, with the potential for a counterproductive effect. Not only should they be carefully tailored, but they also ought to be optional, and serve as a complementary incentive to advance the protection of TK, GRs, and aTK.<sup>208</sup> They should also be secondary in status to the more fundamental right-based approach to protection that must take priority.<sup>209</sup> It is also the position of the African Group that creation of databases is a costly endeavor that should not be imposed upon states. India’s success with the TKDL is a factor of that country’s robust

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<sup>205</sup> See *Documentation and Digitization*, *supra* note 200.

<sup>206</sup> This sentiment is, for example, evident in the support which non-demandeurs attached to preamble 12 and alternative 3(b) of article 2 of the Draft TK Articles, *supra* note 72.

<sup>207</sup> This is captured in the submission of the delegation of Nigeria in the Official Report of WIPO IGC 38, *supra* note 118, at ¶ 89.

<sup>208</sup> Official Report of WIPO IGC 38, *supra* note 118, at ¶ 89, 88 (submission of the representative of the Tulalip Tribes).

<sup>209</sup> Official Report of WIPO IGC 38, *supra* note 118, at ¶ 89 (submission of the delegation of Nigeria).

human capital expertise.<sup>210</sup> As well, the information in the databases was previously codified in Sanskrit, which was translated, making the generation of the TKDL a viable enterprise.<sup>211</sup> Ordinarily, most TK and applications of GRs in TK contexts are not codified and require more elaborate endeavors to build a database from the ground up. Only a few countries in the global south such as India can afford to undertake that endeavor effectively.<sup>212</sup> As well, another view shared by the African Group and the Indigenous Caucus is that breaking TK and TCEs into databases plays into the colonial and international law's template of fragmenting a dynamic and holistic body of knowledge both in substance and in an attempt to regulate it.<sup>213</sup> In addition to other drawbacks, such an approach risks creating an erroneous impression that TK is frozen in time.

Perhaps the most challenging aspect of the database debate at the IGC is the African Group's and its LMC counterparts' reluctance to over-advertise the value of its defensive effect.<sup>214</sup> The defensive effect of databases ties to the broader framework of documentation as a preventative measure that goes to the safeguarding of TK, TCEs, and GRs.<sup>215</sup> Safeguarding, which is, in part, a salvage attempt at the preservation of endangered and fast-disappearing TK, TCEs, GRs, and aTK, is more often associated with UNESCO and is not the primary mandate of the IGC. As opposed to protection, safeguarding of TK is a more neutral endeavor pursued within UNESCO, according to the 2003 UNESCO Convention for the

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<sup>210</sup> See *Documentation and Digitization*, *supra* note 200.

<sup>211</sup> *Documentation and Digitization*, *supra* note 200.

<sup>212</sup> *Documentation and Digitization*, *supra* note 200.

<sup>213</sup> See *supra* note 151 and accompanying text.

<sup>214</sup> See submission of India in the Official Report of WIPO IGC 38, *supra* note 118, at ¶ 87.

<sup>215</sup> See generally Kono, *supra* note 202.

Safeguarding of Intangible Cultural Heritage and related instruments under UNESCO’s auspices.<sup>216</sup> Beyond the defensive effect, the African Group recognizes that in order for databases to effectively advance the protection TK and GRs consistent with the mandate of the IGC, it must be complexly layered in its application.<sup>217</sup> In this regard, experts have identified three formulations of databases, namely (1) publicly accessible national TK databases; (2) national traditional knowledge databases accessible only by intellectual property offices; and (3) non-public accessible national traditional knowledge databases.<sup>218</sup> Avoiding the temptation to interrogate the “national” qualifier of TK in those three categories, it suffices to touch on their significance. The three categories are not exhaustive. In other words, in addition to databases of TK in the public domain, and others designed to be accessible to IP offices for prior art searches (such as the form represented in the TKDL), there are conceivably other forms in which databases of TK could be created. Such forms could take a proactive and non-defensive tenor and accommodate the ability and right of knowledge holders to retain the secrecy or exclusivity of their knowledge under prevailing legal traditions or customary protocols. In such contexts, IPLCs could exercise full control of their TK and would be at liberty to exercise such rights thereto, including the right to deploy or decline to deploy the knowledge for whatever purpose or reason.<sup>219</sup> That ought to be the essence of a

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<sup>216</sup> See United Nations Educational, Scientific and Cultural Organization [UNESCO], *Convention for the Safeguarding of Intangible Cultural Heritage*, MISC/2003/CLT/CH/14 (Oct. 17, 2003).

<sup>217</sup> This is echoed in the submission by the delegation of Nigeria and the representative of the Tulalip Tribes in the Official Report of WIPO IGC 38, *supra* note 118, at ¶ 88, 89 (insisting that all aspects, including risks, costs, and benefits of databases, must be on the table).

<sup>218</sup> See *Draft TK Articles*, *supra* note 72, at art. 5BIS (1)(2)(3).

<sup>219</sup> Such purpose does not exclude the application of TK for intellectual property or other contractual arrangements.

rights-based approach. In such a scenario, databases advance actual protection of TK and empower knowledge holders, to a degree akin to trade secrets pursuant to the formulation (3) mentioned above.

In sum, TK and TCEs databases constitute a critical touchstone that highlights the conceptual divide among negotiating blocs at the IGC. The point of divergence is over the degree of importance attached to databases, the purpose(s) they ought to serve within the mandate of the IGC, and their status in the framework of the IGC instruments. From the text of the latest Draft of TK Article 5BIS, delegates are not even in agreement on what the appropriate title should be; hence, every word is bracketed except “protection.” The Article is titled “[Database], [Complementary] [and] [Defensive] Protection.”<sup>220</sup> The first part of Article 5BIS 1-3 reflects largely the approach favored by the African Group and the majority of demandeur members of the negotiating bloc.<sup>221</sup> It clearly outlines the three database categories situating them unequivocally to serve complementary, defensive, and, perhaps most importantly, actual protective objectives.

On the other hand, the rest of Article 5BIS4-10 contains elaborate but parallel provisions on databases. The gamut of those provisions reflects the emphasis the non-demandeurs place on TK databases as instruments designed to principally facilitate the processing of patent applications by patent examiners, thus enhancing the efficient operations of intellectual property offices.<sup>222</sup> Those provisions attach pre-eminence to the codification of

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<sup>220</sup> *Updated Gap Analysis 1, supra* note 90; *Updated Gap Analysis 2, supra* note 90 (brackets in original).

<sup>221</sup> This is evident from a critical review of the Official Report of WIPO IGC 38, *supra* note 118.

<sup>222</sup> *See supra* note 208 and accompanying text.

publicly available TK for its preservation, sharing, and dissemination of information. This approach reflects consistently non-demandeurs’ preference for framing TK as knowledge in the public domain to be accessed with minimal, if any, constraints to effective operation and promotion of the intellectual property system, notably the patent regime.<sup>223</sup>

## **8. Exceptions and Limitations**

Law does not confer any right in absolute terms. At all levels of jurisprudence, law accommodates the reconciliation of competing norms as a fundamental matter. It is part of the law’s dynamic and its attempt to defer to the philosopher’s unruly horse called public interest. One of the hallmarks of intellectual property rights is that they are demonstrably constrained by exceptions and limitations. The negotiation and application of those exceptions and limitations and the balancing of other interests is, perennially, the animating part of intellectual property jurisprudence.<sup>224</sup> Similar dynamics are also at play in the work of IGC. As it should be expected, the conceptual divide over the nature and purpose of an international instrument for the effective protection of TK, TCEs, and GRs among the demandeurs and non-demandeurs is also evident in their approach to the issue of justifiable exceptions and limitations that will tamper the protection of TK, TCEs, GRs, and aTK.<sup>225</sup> The African Group, LMCs,

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<sup>223</sup> See, for example, the submissions of the delegations of Japan and the Republic of Korea throughout the Official Report of WIPO IGC 38, *supra* note 118, at ¶¶ 82, 24 (Japan), 79, 85 (Korea).

<sup>224</sup> COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., Cambridge University Press 2017).

<sup>225</sup> This is evident in the format of Article 9 (Exceptions and Limitations) of the Draft TK Article and Article 7 of the TCE Article. With regard to the former, Alternative 1 is one simple paragraph that vests latitude on parties to adopt “justifiable exceptions and limitations” in the public interest. This approach received overwhelming support

as well as the Indigenous Caucus, believe that stakeholders should have ample flexibility to determine and administer permissible exceptions and limitations.<sup>226</sup> After all, TK, TCE, and GRs are integral aspects of their custodians' ways of life, and their governance should be within the domain of IPLCs' legal traditions, customary protocols, and practices. Any attempt to determine, legislate, or prescribe the scope and detail of exceptions and limitations from Geneva, in the opinion of the African Group, its LMCs allies, and the Indigenous Caucus, is insensitive, presumptuous, and lacking in legitimacy. To be fair, the complex nature of TK, TCEs, GRs, and aTK requires that any instrument aimed at their protection not only take a unique approach but must also be modest. Perhaps at best, it can articulate and galvanize overreaching principles to inform the framework for such protection. Matters of details are rightfully within the domain of IPLCs and even less dependent on national law and state-centric institutions. A partial reflection of these sentiments appears in Alternative 1 of Article 9 of the latest Draft Article on the Protection of TK, which resulted from IGC 39. It reads:

In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations to protect the public interest, provided such exceptions

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from the African Group as well as all LMCs and all demandeurs. However, the rest of Article 9 from Alternative 2 runs up to 9.2 to 9.7, enumerating categories of exceptions under general and specific in convoluted details. *See Draft TK Articles, supra* note 72; *Draft TCEs Articles, supra* note 72.

<sup>226</sup> *See, e.g.*, Official Report of WIPO IGC 34, *supra* note 106, at ¶¶ 105 (Senegal for the African Group), 106 (Indonesia for the LMCs), 107 (Egypt), 108 (Tulalip Tribes), 109 (Islamic Republic of Iran).

and limitations shall not unreasonably conflict with the interests of beneficiaries nor unduly prejudice the implementation of this instrument.<sup>227</sup>

In contrast, non-demandeurs propose elaborate provisions on exceptions and limitations that leave little or no detail unspecified. Their argument is premised on legal certainty as a critical desire of business. In that approach, exceptions are framed under general and specific categories. General exceptions recognize the discretion of member states to create exceptions and limitations over the protection of TK in collaboration with the beneficiaries.<sup>228</sup> Such limitations and exceptions are conditional to a set of general principles.<sup>229</sup> The general principles include acknowledgment of beneficiaries, ensuring that uses and applications of TK, TCEs, and GRs are not offensive, derogatory, or in conflict with their normal utilization by the beneficiaries, and must be in balance with both “the legitimate interests” of the said beneficiaries and those of third parties.<sup>230</sup> There is also a suggestion that exceptions or limitations could not apply where “there is reasonable apprehension of irreparable harm” to TK, TCEs, or GR.<sup>231</sup>

The African Group and others have reservations over the transplantation of the language of balancing the rights from the TRIPS Agreement.<sup>232</sup> There are also

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<sup>227</sup> *Draft TK Articles, supra* note 72, at art. 9, alternative 1 (brackets in original).

<sup>228</sup> *See Draft TK Articles, supra* note 72, at art. 9, alternative 1.

<sup>229</sup> *Draft TK Articles, supra* note 72, at art. 9, alternative 2, § 9.1(a)(b) (d)(e).

<sup>230</sup> *Draft TK Articles, supra* note 72, at art. 9, alternative 2, § 9.1(a)(b) (d)(e).

<sup>231</sup> *Draft TK Articles, supra* note 72, at art. 9, alternative 2, § 9.2.

<sup>232</sup> The language of the balancing of rights is a direct import from Article 7 of the TRIPS Agreement which echoes and seeks to mitigate

concerns over what constitutes the legitimate interests of third parties in TK, TCEs, GRs, and aTK, as well as where and when such interests arise.<sup>233</sup> Aside from those apprehensions, the provisions on general exceptions are evidently less controversial. However, the major source of suspicion and controversy arises with “specific exceptions” that are literally envisioned, authored, and owned by non-demandeurs through the course of the negotiations. The first obvious observation is that the provisions, which are captured in Articles 9.3 - 9.7 of Alternative 2 of the TK instrument, substantially mimic the classical intellectual property rights with faint, if any, consideration to the idea of *sui generis*. They enumerate open-ended purposes and contexts for which exceptions or limitations to protection should be extended to TK, TCEs, GRs, and aTK. Those include teaching, learning, protection of public health or the environment, display, research, preservation, presentations in libraries, museums, cultural institutions, etc.<sup>234</sup> Other litanies of uses, purposes, and contexts that warrant exceptions and limitations include where TK, TCEs, GRs, and aTK inspire original work of authorship where related knowledge is created, derived from other sources, or is

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the tension between rights owners and users in classical intellectual property law which proponents or demandeurs for the protection of GRs, TK, and TCEs are reluctant to adopt hook, line, and sinker as the contexts for the protection of GRs, TK, and TCEs raise more complex issues beyond the binary of rights owners and users. Early results of the debate over the “balancing of rights and obligations” appear in *Draft TK Articles*, *supra* note 72, at art. 2, preamble #8, alternative 3(a).

<sup>233</sup> A sense of this apprehension is expressed, in part, in the report on the seminar on intellectual property and traditional knowledge as it appears in the World Intellectual Property Organization [WIPO], *Official Report of WIPO IGC 32*, WIPO/GRTKF/IC/32/11, (Dec. 2, 2016) (remarks by Chischilly on the challenge over the navigation of the interest of “third parties” seeking to access TK or TK databases).

<sup>234</sup> See *Draft TK Articles*, *supra* note 72, at art. 9.3, alternative 2.

known outside of the IPLC or beneficiaries.<sup>235</sup> Additional exceptions include printed publications and individual or collective holders of the knowledge in so far as they gave their approval for the third party to use the knowledge.<sup>236</sup> There is so much in the approach favored by the non-demandeurs as ex-rayed above that is begging to be unpacked. However, space forbids getting into many details. Nevertheless, the African Group, Indigenous Caucus, and the demandeur groups consider the detailing of these exceptions in ways that put them outside the discretion of the custodians of TK, TCEs, and GRs, as having “so many loopholes” as to undermine the purpose of the instrument.<sup>237</sup> Carefully evaluated, they reflect an attempt by non-demandeurs to completely undermine the *raison d’être* of the IGC, a case of taking with the left hand what was bequeathed by the right hand. Application of these litanies of exceptions and limitations will leave virtually no protection for TK, TCEs, and GRs. Evidently, these elaborate exceptions are inspired by intellectual property jurisprudence, further cementing the conceptual divide among actors over their vision of the status of the instruments resulting from the IGC.<sup>238</sup> It is instructive that

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<sup>235</sup> *Draft TK Articles, supra* note 72, at art. 9.4, 9.5, alternative 2.

<sup>236</sup> *See Draft TK Articles, supra* note 72, at art. 9, alternative 2, § 9.6(a)(b). The WIPO IGC 40 TK Draft Articles makes reference to “free, prior and informed consent or approval and involvement,” “mutually agreed terms for [access and benefit sharing],” and “[fair and equitable compensation],” all of which are inspired by the CBD and the Nagoya Protocol. *See Draft TK Articles, supra* note 72, at art. 9, alternative 2, § 9.6(b)(c) (brackets in original).

<sup>237</sup> *See Official Report of WIPO IGC 32, supra* note 233, at ¶¶ 248 (Nigeria against the enumeration of general and specific exceptions), 252 (Ghana), 255 (China), 256 (Thailand), 250 (Tulalip Tribes arguing against the enumeration of exemptions and limitations and noting that the approach has “so many loopholes” capable of undermining effective protection of TK and TCEs).

<sup>238</sup> The use of enumerative categories of exceptions as listed in *Draft TK Articles, supra* note 72, at art. 9, alternative 2 Text (Article 7 of

even in the conventional intellectual property prism, all the heads of exceptions and limitations now sought to be transposed to TK, TCEs, and GRs are sites of continuing tension and negotiations in intellectual property jurisprudence and policy-making.<sup>239</sup>

The insistence that exceptions and limitations in the TK, TCEs, and GRs instrument(s) mimic the intellectual property framework runs counter to recognizing the unique nature of these subject matters as a departure from a core intellectual property approach to their protection.<sup>240</sup> A common premise which, in my experience, seems to be perhaps more appreciated by the African Group and demandeurs in general than their non-demandeur counterparts is that the gaps in conventional IP law account for its failure to effectively protect these subject matters that gave rise to the work of the IGC.<sup>241</sup> For example, publication, or lack thereof, plays a conflicting role in the exploitation, protection, and preservation of TK, TCEs, and GRs as it helps to also animate the use of databases as a measures-based tool for the protection of these subject matters.<sup>242</sup> Also, historically, libraries, museums, and so-

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Draft TCEs Text) is consistent with the approach to exceptions and limitations in traditional intellectual property.

<sup>239</sup> See generally Okediji, *supra* note 224.

<sup>240</sup> Without question, the gaps around the application of intellectual property to TK and TCEs is the reason why a *sui generis* approach is necessary as adumbrated in *Updated Gap Analysis 1*, *supra* note 90 and *Updated Gap Analysis 2*, *supra* note 90.

<sup>241</sup> *Updated Gap Analysis 1*, *supra* note 90; *Updated Gap Analysis 2*, *supra* note 90.

<sup>242</sup> See Nishidl Patel, *Prior Art: Issues and Concerns* (2011), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1922353](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1922353) [<https://perma.cc/F62K-4S9X>]. See generally Krishna Ravi Srinivas, *Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions* (2012), <https://ssrn.com/abstract=2012724> [<https://perma.cc/Y4H8-A7KZ>]. Until fairly recently, the only proof of prior art acceptable in the United States, the

called cultural institutions have been complicit in the misappropriation of TK, TCEs, and GRs.<sup>243</sup> As colonial institutions with associated burdens of distrust over their dealings with cultural properties, they could not be taken for granted as sites of refuge for the protection of these subjects. This becomes evident when such moves are promoted by countries who have historically benefited from the misappropriation of TK, TCEs, and GRs either under the colonial framework or its various continuing transformations.<sup>244</sup> The Chair's GR Text on exceptions and limitations adopts a middle-ground approach that reflects the two extremes to some degree. It provides as follows:

In complying with the obligation set forth in Article 3, Contracting Parties may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such justifiable exceptions and limitations do not unduly prejudice the implementation of this instrument or mutual supportiveness with other instruments.<sup>245</sup>

#### IV. CONCLUSION

The tense nature of the IGC negotiations is a logical consequence of the fundamental divide between the demandeurs and non-demandeur countries in terms of their

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world's leading patenting jurisdiction, was formal publication. Because most information on GRs and aTK was not codified and not published in forms recognized by the United States Patent and Trademark Office, patentees were free to appropriate the information into their patent claims.

<sup>243</sup> See, e.g., Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 729, 745–46 (2014).

<sup>244</sup> See generally GLOBAL BIOPIRACY, *supra* note 44.

<sup>245</sup> Chair's Draft GR Text, *supra* note 76, at 11.

conceptual orientation to the committee, as well as their expectations of how much intellectual property concepts could influence IGC outcomes. It is also a reflection of the ideological gulf that has characterized attempts at valorizing traditional knowledge, traditional cultural expressions, and genetic resources in global knowledge governance. Resistance amongst experts on core issues continues to linger even though notable progress has been made, especially with regard to simplifying and narrowing gaps in the working texts. Negotiating experience has proven that with strong leadership at the level of the Chair, progress can be fast-tracked as evident with the current negotiations on Genetic Resources. As explored in this Article, there are lingering points of divergence now delineated effectively with clear pathways for closing gaps. This is evident in the text of the three instruments. However, continuing slow progress at IGC only points to the need to activate political pressure toward the resolution of outstanding issues. For starters, rather than rely on the biennial mandate of WIPO courtesy of the benevolence of WIPO's General Assembly, making the IGC part of WIPO's Standing Committee is worth investing some political capital by demandeurs (including African countries) and non-demandeurs alike. Such permanent standing is necessary given the dynamic nature of the subject matters of the IGC's mandate. It will also help keep issues relating to that mandate on the burner alongside developments in related Standing Committees for effective coordination and harmonization. While much fuss has been made as to the outcome of the IGC, many important demandeur countries and centers of global genetic resources with a strong endowment in traditional knowledge and cultural diversity, including those of Africa and many under the LMCs bloc, have long moved on with domestic legislation that are consistent with the mandate of the IGC. The emergent legislation, as evidence of state

practices, constitutes the basis for those countries to build on their solidarity to explore a regional framework that could consolidate those legislative trends. Such options outside the WIPO process, even though not a preferred choice, should remain open. For the Indigenous Caucus, the international momentum and acceptance of UNDRIP represents a solid basis to keep up the pressure for non-demandeur states, especially the CANZUS group (Canada, Australia, New Zealand, United States) to take the IGC mandate seriously. Potentially, a coalescing of these efforts (from demandeurs and the Indigenous Caucus) will make it possible to isolate the few non-demandeur countries that characteristically take obstructive positions. In that category are the United States, South Korea, and Japan. Habitually, the triad's negotiating positions do not disguise their lack of commitment to any outcome from the IGC process. From my experience participating in the IGC negotiations, those few countries have capitalized on a distorted application of the consensus theory of the international law-making process to frustrate the genuine commitment of the overwhelming majority for expeditious resolution of outstanding issues at the IGC. By conveniently equating it to unanimity, powerful states tend to use the international consensus theory to frustrate the negotiations. As demonstrated in the making of the CBD and the UNDRIP, clearly with enough political will, the IGC's mandate is still within reach. Subject, of course, to the unprecedented disruptive effects of the COVID-19 pandemic, the next biennium (2020/2021) will be crucial.